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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ISABELLE CRAIG, sole heir-at-law and successor in interest to CARL M. WORTH, and SHELL OIL COMPANY, a Delaware corporation,

Appellants,

v.

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, TOTAL LEONARD, INC., THE DOW CHEMICAL COMPANY, SAXON OIL COMPANY, JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, and DELORES M. COOK d/b/a SOUTHWESTERN OIL COMPANY,

Appellees.

On Appeal From The Supreme Court Of Michigan

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

May the State of Michigan, consistent with the due process clause of the Fourteenth Amendment, divest one person of title to an oil and gas interest in real estate and give it to another, without providing notice, an opportunity to be heard or compensation to the person from whom the property has been taken?

PARTIES TO PROCEEDINGS BELOW

By order of the Michigan Supreme Court, this case, styled *Bickel* v. *Fairchild* below, and a second case raising similar issues (*Van Slooten* v. *Larsen et al.*, No. 62256, Michigan Supreme Court) were briefed and heard together. With the exceptions of Carl M. and Doris W. Worth,* all of the parties to the *Bickel* appeal below are listed in the caption of the appeal to this Court.**

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* Both are deceased. Their interest has passed to appellant Isabelle Craig.

** Shell Oil Company, the sole corporation by whom this Jurisdictional Statement is filed, is a Delaware corporation. Approximately 69 percent of Shell Oil Company's outstanding shares of common stock is owned of record or beneficially by Shell Petroleum, N.V., a Netherlands company. The voting shares of Shell Petroleum, N.V., are owned 60 percent by Royal Dutch Petroleum Company, the Hague, Netherlands, and 40 percent by The "Shell" Transport and Trading Company, Ltd., London, England. No affiliate or subsidiary of Shell Oil Company has any interest, financial or otherwise, in the outcome of proceedings in this Court.

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Appellees.

On Appeal From The Supreme Court Of Michigan

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 410 Mich. 21, 299 N.W.2d 704 (1980), and is reprinted at Appendix A. The opinion of the Michigan Court of Appeals is reported at 83 Mich. App. 467, 268 N.W.2d 881 (1978), and is reprinted at Appendix B. The Michigan Circuit Court's opinion, which is reprinted at Appendix C, is unreported.

JURISDICTION

The proceedings below were commenced by appellees in Michigan Circuit Court to quiet title to certain oil and gas properties. Appellants defended by challenging the constitutionality of the statute under which appellees claimed title to the property in question. The trial court ruled that the statute, Michigan's Dormant Mineral Act, is unconstitutional. The Court of Appeals affirmed.

On December 23, 1980, the Michigan Supreme Court entered final judgment reversing the Court of Appeals and upheld the Michigan statute against challenges based upon the Michigan and United States Constitutions. Notices of appeal were filed by mail on February 24, 1981, and March 12, 1981, in the Michigan Supreme Court. Jurisdiction over this appeal from the Michigan Supreme Court's judgment is conferred by 28 U.S.C. § 1257(2).

Because this appeal draws into question the constitutionality of Michigan's Dormant Mineral Act, 28 U.S.C. § 2403(b) may be applicable. Accordingly, a copy of this jurisdictional statement is being served upon Michigan's Attorney General.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. **United States Constitution, Amendment XIV, Section 1:**

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Michigan Dormant Mineral Act, Michigan Compiled Laws:

554.291 Oil or gas interest in land; abandonment; claim of interest; vesting in surface owner.

Section 1. Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transferred by instrument recorded in the register of deeds office for the county where such interest is located for a period of 20 years shall, in the absence of the issuance of a drilling permit as to such interest or the actual production or withdrawal of oil or gas from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, or the use of such interest in underground gas storage operations, during such period of 20 years, be deemed abandoned, unless the owner thereof shall, within 3 years after the effective date of this act or within 20 years after the last sale, lease, mortgage or transfer or record of such interest or within 20 years after the last issuance of a drilling permit as to such interest or actual production or withdrawal of oil or gas, from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of such interest in underground gas storage operations, whichever is later, record a claim of interest as hereinafter provided. Any interest in oil or gas deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership. **Drilling permit.** The phrase "drilling permit" shall mean a permit to drill an

oil or gas well issued by the conservation department or its successor. P.A.1963, No. 42, § 1, Eff. Sept. 6.

STATEMENT OF THE CASE

This action to quiet title was filed in a Michigan Circuit Court by John and Etta Mae Bickel and various parties claiming a leasehold estate in oil and gas through the Bickels.[1] Named as defendants were Carl and Doris Worth, both now deceased, and others claiming conflicting rights to the same property.[2]

The facts underlying this case are not in dispute. In 1944, Isabelle Worth deeded to others the surface rights to a parcel of real estate. She, however, reserved the mineral estate pertaining to that parcel. Carl and Doris Worth succeeded to the interests of Isabelle Worth upon her death in 1956. In 1973, they granted an oil and gas lease to Shell Oil Company.[3]

The surface rights sold by Isabelle Worth in 1944 ultimately were conveyed to John and Etta Mae Bickel. In 1974, the Bickels purported to lease oil and gas interests underlying their property to Getty Oil and others.

The premise underlying the Bickels' lease to Getty and their assertion of title to the mineral rights against the Worths is the Michigan Dormant Mineral Act,

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[1] Getty Oil Co., Skelly Oil Co., Total Leonard, Inc., Dow Chemical Co., and Saxon Oil Co.

[2] Shell Oil Co., James and Winifred Fairchild, and Delores Cook d/b/a Southwestern Oil Co.

[3] The Worths have since died, and their daughter and sole heir-at-law, Isabelle Craig, has succeeded to their interests.

Michigan Comp. Laws § 554.291 ("Act"). That statute, which was passed in 1963, provides that "any interest in oil or gas in any land" shall be taken from the subsurface owner and given to the surface owner unless, within the prior 20 years, (1) it has been sold, leased, mortgaged, or transferred by recorded instrument; (2) a "drilling permit" has been issued for such oil or gas; (3) "actual production" or withdrawal of oil or gas has occurred; (4) the lands in question have been pooled, unitized, or otherwise included in a plan of unit operations; or (5) the area has been used for the underground storage of gas.

The Act was not limited to prospective operation. Instead, it applies retroactively to properties, such as those owned by the Worths, where the mineral and surface estates were severed prior to its enactment. Owners of such mineral estates, or those claiming through them, were given three years following the enactment of the statute to register their interest in the mineral estate. Thereafter, failing such registration, the Michigan statute automatically vests title in the surface owner. The statute does not require notice, even by publication, informing subsurface owners that their title is in jeopardy. It operates without the benefit of any process, judicial or administrative. It provides for no payment of compensation.

In the proceedings below, it was conceded that neither the Worths nor those claiming through them had performed any of the acts enumerated in the Act prior to the enactment of the statute, nor had they fulfilled the registration requirement in the three years that followed. The only issue presented for decision was the constitutionality of the statute under both the

Michigan and the federal constitutions. Specifically, the defendants argued in their motion for summary judgment that the Michigan statute deprived them of their property without due process and equal protection of the laws under the Fourteenth Amendment and was an unconstitutional impairment of contract proscribed by Article 1, Section 10, of the United States Constitution.

The trial court granted the Worths' summary judgment motion and struck down the Dormant Mineral Act under the Michigan constitution. That court did not reach the federal questions posed by the Worths' motion for summary judgment. (*See* Appendix C, p. 44a). However, the Michigan Court of Appeals affirmed the trial court's judgment by expanding upon its rationale and finding that "[t]he effect and application of this Act as to the defendants at bar is prohibited by our state and federal constitutions . . . ." (Appendix B, p. 38a).

The Michigan Supreme Court reversed both the state and federal constitutional rulings. Over three dissents, that court concluded that the Act did not deprive the Worths of their property without due process of law. The court also rejected other claims pressed below under the federal constitution's contract and equal protection clauses.

THE QUESTION PRESENTED IS SUBSTANTIAL

This appeal raises important issues under the Fourteenth Amendment that have been decided in a conflicting manner by the highest courts of six States. In recent years, a number of States have passed dor-

mant mineral legislation.[4] In four, the legislation has been invalidated under the federal constitution.[5] The highest courts of Indiana and Michigan, on the other hand, have upheld such legislation.

This Court has recently been presented with appeals from the decision of the Indiana Supreme Court upholding that State's version of a dormant mineral act.[6] Unless those appeals result in summary invalidation of the Indiana law on grounds broadly applicable to the Michigan statute, this case should be set for full oral argument.

The appellants in the Indiana case have made only fleeting reference to the issue to which the first portion of this jurisdictional statement is devoted: the operation of a dormant mineral act as an unconstitutional taking under the Fourteenth Amendment. Instead, appellants there have rested their argument principally upon claims of procedural due process, an issue that is developed in the second portion of this jurisdictional statement.

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[4] *See* Fla. Stat. Ann. § 704.05 (Supp. 1978); Ga. Code § 85-407.1 (1978); Ill. Rev. Stat. ch. 30, §§ 197-98 (1973) (held unconstitutional); Ind. Code §§ 32-5-11-1 to -8 (1976); Mich. Comp. Laws § 554.291 (1970); Minn. Stat. Ann. §§ 93.52 *et seq.* (1977) (held unconstitutional); Neb. Rev. Stat. §§ 57-228 to -231 (1974) (held uncontitutional); N.C. Gen. Stat. § 1-42.1 (1969); Tenn. Code Ann. § 64-704 (Supp. 1978); Va. Code § 55-154 (1974); Wis. Stat. § 700.30 (1978) (held unconstitutional).

[5] *See* discussion at p. 15, *infra*.

[6] Texaco, Inc. v. Short, No. 80-965 (appeal docketed Dec. 19, 1980), Pond v. Walden, No. 80-1018 (appeal docketed Dec. 19, 1980), appealing from Short v. Texaco, Inc., —— Ind. ——, 406 N.E.2d 625 (1980).

In every prior case in the State courts involving this type of legislation, there has been a discussion of procedural due process either without a recognition of the substantive taking question or without a clear exposition of that issue. Through an analysis of the taking question, this Court can bring some order to the by now chaotic collection of State court decisions involving dormant mineral acts.

I.

> "The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar ones: 'nor shall private property be taken for public use, without just compensation.' That prohibition, of course, applies against the States through the Fourteenth Amendment."

Webb's Fabulous Pharmacies, Inc. v. *Beckwith,* 101 S. Ct. 446, 450 (1980).

By its Dormant Mineral Act, Michigan takes one individual's property and gives it to another without any pretense of providing the procedural and substantive rights that constitutionally are required in eminent domain proceedings. The statute takes, in the words of *Andrus* v. *Allard,* 444 U.S. 51, 66 (1979), the "full 'bundle' of property rights" possessed by a mineral estate owner, not merely "one 'strand' of the bundle." In prohibiting the subsurface owner's "right to exclude" the surface owner from access to any oil or gas underlying the real estate, it takes what is "universally held to be a fundamental element of the property right [that] falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna* v. *United States,* 444 U.S. 164, 179-80 (1979)

(footnote omitted).[7] These and other cases involving lesser invasions by the State of property rights *a fortiori* show the unconstitutionality of the Michigan Dormant Mineral Act.

Pennsylvania Coal Co. v. *Mahon,* 260 U.S. 393 (1922), recently described by this Court as the "leading case" in this area,[8] is most instructive. *Mahon* also dealt with severed mineral interests and the claims of surface owners. There, a Pennsylvania statute prohibited the mining of coal by a mineral estate owner, if such activities threatened to cause subsidence that might endanger the surface owner. Although recognizing that the State could be concerned with public safety under such circumstances, the Court struck down the Pennsylvania statute, because "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414.

Mahon directly applies here. In that case, nominal title was left in the coal company, but it was prevented from productively using its property in order to protect the surface owner. Here, in order to effect what Michigan considers to be a valid public policy, title is actually taken from the mineral estate owner and is transferred to the surface owner. Thus, as in *Mahon,* "there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413.

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[7] Indeed, the Michigan statute goes beyond the taking condemned in *Kaiser Aetna,* since it gives the surface owner the right to exclude the mineral estate holder from the use of his own property.

[8] Penn Central Trans. Co. v. New York City, 438 U.S. 104, 127, *reh. denied,* 439 U.S. 883 (1978).

That the direct beneficiaries of the Michigan statute are private parties, rather than the state itself, does not make it any less a taking. The same was true in *Mahon.* Moreover, the Court in its recent opinion in *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649 (1976), assumed that the transfer of title to severed mineral interests from one group of private parties to an Indian tribe pursuant to federal legislation would constitute a taking by the United States, if the persons from whom these rights were taken had vested interests. *See* 425 U.S. at 651-52. And in *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 148-55 (1974), this Court recognized that the statutorily directed transfer of railroad properties to Conrail—"basically a private, not a governmental, enterprise," *id.* at 152—could "indeed be a taking of private property for public use." *Id.* at 155. *See also Berman* v. *Parker,* 348 U.S. 26, 33-34 (1954).

The Michigan Supreme Court upheld the Michigan statute against the Worths' constitutional challenge by posing the question "whether it was a proper exercise of the state's police powers" (Appendix A, p. 8a), and by placing upon the Worths the burden of "prov[ing] either that no public policy is served by the act or that no reasonable relationship exists" between it and the public purpose that it sought to achieve (Appendix A, pp. 8a-9a). Posing the wrong question, the Michigan court reached the wrong result.

Whether or not the Michigan act is reasonably related to a valid public purpose, the fact remains that the legislature has used that purpose to define the type of mineral interest that the State desires to take from certain property owners and give to others. Michigan

has, by statute, identified five criteria (*see* p. 5, *supra*) as indicating that particular mineral estates would, in its judgment, more likely be developed if placed in the hands of the surface owner. This is no different than Michigan's definition by statute of a particular kind of property that could best be used as a right-of-way for a public highway. Even assuming Michigan had wisely chosen the right location for the highway, or here has properly identified the kind of mineral estate that might be better developed by someone else, it has merely established the public purpose to be served by the taking.

The definition of the public purpose to be served by a taking is properly a legislative question. *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 282-83 (1925). But even a sound legislative declaration of the purpose to be served by a taking does not negate the need for the notice, hearing, and just compensation that constitutionally must accompany the taking. These requirements of the due process clause cannot be avoided by legislative declarations as to the need for the taking. *Id.* at 285.

It is also clear that the Michigan court's reference to recording acts cannot sustain Michigan Dormant Mineral Act. (Appendix A, pp. 10a-15a.) Under a recording act, a subsequent *bona fide* purchaser's title to property is deemed superior to that of a prior purchaser who failed to record the deed or other instrument evidencing the transaction upon which claim of ownership is based. The recording act does not take the entire "bundle of rights" from the prior purchaser; he or she retains a cause of action against the seller. *Compare Penn Central Transportation Co.* v. *New York City, supra*, 438 U.S. at 137. The Dormant Mineral Act, by contrast,

deprives owners of oil and gas properties of every vestige of ownership.[9]

Any attempt to liken the Michigan statute to common-law abandonment must also fail. Indicia of abandonment are merely evidence of a surface owner's intention to relinquish his property and make it available to another. *Cf. Baglin* v. *Cusenier Co.*, 221 U.S. 580, 597-98 (1911).[10] The Michigan Supreme Court squarely held that the Michigan act was not based on such an evidentiary presumption:

> "[T]he act does not create any evidentiary presumption. None of the provisions of the act purport to be concerned with the owner's intent to abandon . . . . Rather, the act is designed to increase the marketability and development of severed mineral interests by creating a rule of substantive law which requires owners to undertake minimal acts indicative of ownership at least every 20 years." (Citation omitted.) (*See* Appendix A, p. 17a.)

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[9] The Michigan Supreme Court's reliance upon Jackson v. Lamphire, 28 U.S. 280 (1830) (Appendix A, pp. 13a-14a) to sustain the constitutionality of applying a recording act to void a deed that preceded the act is of no significance for an additional reason. As the lower court recognized, *Jackson* was decided prior to adoption of the Fourteenth Amendment and was based upon the contract clause of the federal constitution. (Appendix A, p. 13a). A state's power to impair contracts is measured by a less stringent standard than the one used under the Fourteenth Amendment to measure its power to take property. *Compare* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), *with* Pennsylvania Coal Co. v. Mahon, *supra*, 260 U.S. 393.

[10] By contrast, an oil and gas estate owner's decision not to develop the resource may be a function of economic or other considerations. Certainly, such inactivity does not bespeak an intention to abandon the property.

The State court's construction of the Michigan statute is, of course, binding on this Court. *See, e.g., Webb's Fabulous Pharmacies, Inc.* v. *Beckwith, supra,* 101 S. Ct. at 450; *Standard Oil Co.* v. *New Jersey,* 341 U.S. 428, 432 n.2 (1951), and cases cited therein.

In sum, Michigan has purported to encourage oil and gas development through the taking of private property without observing the procedural or substantive safeguards associated with eminent domain proceedings. By upholding the legislature's choice of means in this case, the Michigan Supreme Court fell into the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at 416.

II.

In addition to the Michigan statute's failure to afford the constitutionally-mandated procedures and remedies that limit a State's use of its eminent domain power, the Dormant Mineral Act unconstitutionally fails to provide the notice and opportunity to be heard that this Court has prescribed for deprivations of property that do not rise to the level of a taking.

Mullane v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), is the leading case in this area. There, the Court required personal notice for individuals readily identifiable and notice by publication for all others prior to the appointment of a trustee to manage certain trust assets. As the Court explained, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality

is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

Thus, even if its operation does not result in an uncompensated taking, the Dormant Mineral Act is fatally deficient. It effects a destruction of title, not merely an appointment of a trustee, without notice of any kind. Absent owners are given no opportunity to appear in any proceeding "to present their objections" before their property is taken from them.

This Court's review of cases involving state escheat statutes validates this reading of *Mullane*. *See Standard Oil Co.* v. *New Jersey,* 341 U.S. 428 (1951); *Anderson National Bank* v. *Luckett,* 321 U.S. 233 (1944); *Security Savings Bank* v. *State of California,* 263 U.S. 282 (1923). In these cases, various statutes provided that certain "dormant" property—inactive bank accounts, unclaimed dividends, or the like—would escheat to the state after the passage of a specified number of years. In each case, this Court has made it clear that escheat statutes must provide notice and an opportunity for the absent owner to appear and declare his or her interest in the property at issue. Thus, in *Anderson National Bank, supra,* the Court stated, "[O]ur inquiry must be directed to the question whether the procedure by which the state undertakes to acquire the depositors' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard." 321 U.S. at 243. *See also Standard Oil Co.* v. *New Jersey, supra,* 341 U.S. at 432-35; *Security Savings Bank* v. *State of California, supra,* 263 U.S. at 287.

Plainly, Michigan's Dormant Mineral Act produces a deprivation of property that is at least as complete as that brought about by an escheat statute. It, therefore, is subject to the same constitutional safeguards.

III.

With its decision in this case, the Michigan Supreme Court becomes the second state court of last resort to uphold a dormant mineral statute in the face of a substantial challenge on federal constitutional grounds. *See* pp. 6-7, *supra*. The highest courts of four other States, on the other hand, have invalidated similar legislation under the Fourteenth Amendment. *See Wilson* v. *Bishop*, 82 Ill. 2d 364, 412 N.E.2d 522 (1980); *Contos* v. *Herbst*, —— Minn. ——, 278 N.W.2d 732, *appeal dismissed sub nom.*, 444 U.S. 804 (1979); *Wheelock* v. *Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978); *Chicago & North Western Transportation Co.* v. *Pedersen*, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

In addition, at least four other states—Florida, Georgia, Tennessee, and Virginia—have enacted dormant mineral legislation. *See* Note, *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act*, 12 Ind. L. Rev. 455, 459 n.19 (1979). Thus, the potential exists for further conflicts among the States. The existence of a substantial federal question as to which the state courts have reached and may continue to reach contradictory conclusions is a compelling reason for granting plenary review. *See Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, *supra*, 101 S. Ct. at 449-50; *Fuller* v. *Oregon*, 417 U.S. 40, 42 (1974). *See also Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35, 37 (1977); *United States* v. *Oregon*, 366 U.S. 643, 645, *reh. denied*, 368 U.S. 870 (1961).

CONCLUSION

For the reasons recited above, this Court should grant this appeal and hear this case on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MICHIGAN
SUPREME COURT

No. 62256

H. JOHN VAN SLOOTEN, *Plaintiff-Appellee,*

v.

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAYE PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LESTER TEATER: unknown claimants, unknown owners; and any and all unknown heirs, devisees, legatees, and assignees of NELLIE F. GILL, deceased,
Defendants-Appellants,

No. 61917

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, a Delaware Corporation, SKELLY OIL COMPANY, a Delaware Corporation, TOTAL LEONARD, INC., a Michigan Corporation, THE DOW CHEMICAL COMPANY, a Delaware Corporation, SAXON OIL COMPANY, a Texas Corporation,
Plaintiffs and Appellants,

v.

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware Corporation, DELORES M. COOK, d/b/a SOUTHWESTERN OIL COMPANY, *Defendants and Appellees.*

BEFORE THE ENTIRE BENCH

M. S. COLEMAN, C.J.

The issue in these cases is the constitutionality of the dormant mineral act, MCL 554.291 *et seq.*; MSA 26.1163(1)

et seq.,[1] as applied to these oil and gas interests created prior to the passage of the act in 1963. In *Bickel* v *Fairchild*, 83 Mich App 467; 268 NW2d 881 (1978), the Court of Appeals held that the act unconstitutionally impaired

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[1] MCL 554.291; MSA 26.1163(1) provides:

"Sec. 1. Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transferred by instrument recorded in the register of deeds office for the county where such interest is located for a period of 20 years shall, in the absence of the issuance of a drilling permit as to such interest or the actual production or withdrawal of oil or gas from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, or the use of such interest in underground gas storage operations, during such period of 20 years, be deemed abandoned, unless the owner thereof shall, within 3 years after the effective date of this act or within 20 years after the last sale, lease, mortgage or transfer of record of such interest or within 20 years after the last issuance of a drilling permit as to such interest or actual production or withdrawal of oil or gas, from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of such interest in underground gas storage operations, whichever is later, record a claim of interest as hereinafter provided. Any interest in oil or gas deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership."

Statutes relating to severed mineral interests have been enacted in other jurisdictions. Although they are all designed to improve the marketability of severed mineral interests, they employ different approaches to their objective. Therefore it is necessary to analyze each statute's provisions in detail when comparing and contrasting it with Michigan's act. See Ill Ann Stat, ch 30, § 197 (Smith-Hurd), held unconstitutional in *Wilson* v *Bishop*, —— Ill 2d ——; —— NE2d —— (1980), Ind Code Ann §§ 32-5-11-1 *et seq.* (Burns), held constitutional in *Short* v *Texaco Inc*, ——

the obligation of contract. In *Van Slooten* v *Larsen*, 86 Mich App 437; 272 NW2d 675 (1978), another panel of the Court of Appeals upheld the constitutionality of the act. We hold that the act does not unconstitutionally impair the obligations of contracts as applied in these cases.

I.

In Michigan, the ownership of a mineral interest can be severed from the ownership of the surface estate, see *Rathbun* v *Michigan*, 284 Mich 521, 534; 280 NW 35 (1938). At common law, these severances create fee estates, corporeal hereditaments, for the owners of the severed mineral interests,[2] which could not be abandoned.[3]

Ind ——; 406 NE2d 625 (1980), Minn Stat Ann § 93.52 *et seq.*, Neb Rev Stat §§ 57-228—57-231, held unconstitutional in *Wheelock* v *Heath*, 201 Neb 835; 272 NW2d 768 (1978), SD Compiled Laws Ann § 43-30-8.1, NC Gen Stat §§ 1-42.1—1-42.3. See, also, Minn Stat Ann § 93.55; Wis Stat Ann § 700.30, held unconstitutional in *Chicago & North Western Transportation Co* v *Pedersen*, 80 Wis 2d 566; 259 NW2d 316 (1977). See, also, Fla Stat Ann § 704.05, Ga Code Ann § 85-407.1, La Civ Code Ann art 753, Tenn Code Ann § 64-704, Va Code §§ 55-154, 55-155. See, also, fns 14, 15, 26 and 28, *infra*.

[2] See 54 Am Jur 2d, Mines and Minerals, § 116, p 299, 1A Thompson, Real Property, § 160, p 30.

[3] See 1 Williams & Meyers, Oil and Gas Law, § 210.1, p 110, Roberton, *Abandonment of Mineral Rights*, 21 Stanford L Rev 1227 (1969), Simonton, *Abandonment of Interests in Land*, 25 Ill L Rev 261 (1930). The rationale underlying the common-law prohibition against abandoning corporeal hereditaments concerns problems peculiar to feudal tenure and society, see 4 Kent, Commentaries (14th ed), p 259, Roberton, *supra*, 1228, but the prohibition still remains part of the common law, see *In re Estate of Matt Miller*, 274 Mich 190, 193; 264 NW 338 (1936). Interests in land can be abandoned in civil-law jurisdictions, see *Sena* v *United States*, 189 US 233, 239-240; 23 S Ct 596; 47 L Ed 787 (1903),

The dormant mineral act provides that if the owner of a severed oil and gas interest fails to take actual possession of the interest as specified in the act,[4] transfer the interest by recorded instrument, or record a notice of claim of interest for a period of 20 years, the interest is deemed abandoned and title to it vests in the owner or owners of the surface estate. The act, passed in 1963, also provided a three-year grace period in which owners of interests created before the act was passed could record a claim of interest and preserve their interests.

Although we recognize the fact that the Legislature *could have* adopted other, if more tortuous, means of addressing this foreseeably increasing problem of mineral shortages, it *did not*. Therefore, we must commence with the concept that the statute must be presumed to be constitutional.

II.

The relevant facts in these cases are very similar.[5] In both cases, the owner of the land sold it by a deed recorded prior to 1946, excepting from the conveyance the title to the oil and mineral estates. In 1963, the dormant mineral act was passed. Because the owners of the severed oil and gas interests had not performed any of the acts specified in the act or recorded a claim of interest for a period of over

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La Civ Code Ann art 753. Incorporeal interests, such as easements and profits *à prendre*, are subject to abandonment at common law, see *Gerhard* v *Stephens*, 68 Cal 2d 864; 442 P2d 692; 69 Cal Rptr 612 (1968). It is the corporeal nature of these interests which necessitates the analysis of the state's police power in Part IV, *infra*.

[4] See fn 1, *supra*.

[5] The relevant facts are stated in more detail in *Bickel* v *Fairchild*, 83 Mich App 467; 268 NW2d 881 (1978), and *Van Slooten* v *Larsen*, 86 Mich App 437; 272 NW2d 675 (1978).

20 years by 1966, their interests, pursuant to statute, were deemed abandoned and vested in the owners of the surface estates. In *Van Slooten*, the defendants, claiming through the reservation of title to the mineral interests in the deed severing the interests, executed oil and gas leases covering their interests in 1970. In *Bickel*, the owners of the mineral interests, the owners of the surface estate in 1966 and the present owners of the surface estate, all executed separate oil and gas leases covering the land in 1973 and 1974. The owners of the surface estates then filed suit to quiet title to the oil and gas interests.

III.

Defendants contend that the act unconstitutionally impairs the obligation of contracts, US Const, art I, § 10, Const 1963, art 1, § 10. They argue that the act severely impairs and destroys reliance interests, favors narrow private groups, was not prompted by any emergency or tailored to meet one and was not temporary or experimental, and thus that the statute unconstitutionally impairs the obligation of contracts. Compare *Home Building & Loan Ass'n* v *Blaisdell*, 290 US 398; 54 S Ct 231; 78 L Ed 413 (1934).

When adjudicating impairment claims, the first inquiry should be whether the act has, in fact, operated as a substantial impairment of the contract relationship. The severity of the impairment determines the height of the hurdle the act must clear, *Allied Structural Steel Co* v *Spannaus*, 438 US 234, 244-245; 98 S Ct 2716; 57 L Ed 2d 727 (1978).

El Paso v *Simmons*, 379 US 497; 85 S Ct 577; 13 L Ed 2d 446 (1965), is instructive in reaching the conclusion that, although the consequences of failing to undertake one of the specified acts or to record a claim of interest every 20 years may be severe, the obligation to record is so mini-

mal that the presumption of constitutionality is not overcome.

El Paso involved a Texas statute that cut off a purchaser's right to re-claim land forfeited to the state for non-payment of the purchase price after five years from the original default. Prior to the enactment of the statute, a purchaser's right to have claims reinstated by paying the full amount due up to the date of reinstatement was unlimited. The Court upheld the statute although failure to meet the additional requirement (payment within five years) resulted in a complete forfeiture of any remaining rights in the property.

In the instant cases, the impairment or additional obligation imposed by the act cannot seriously be contended to have comprised a "high" hurdle. Neither can it be seriously contended that the defendants were substantially induced to enter the initial contractual relationships in reliance on the fact that their interests need not be recorded, or recorded more than once, or that such a requirement significantly changed their bargaining position.

In *Short* v *Texaco, Inc,* —— Ind ——; 406 NE2d 625 (1980), the Court upheld Indiana's mineral lapse act, Ind Code §§ 32-5-11-1 *et seq.*, a statute similar to Michigan's dormant mineral act, holding that it did not violate the constitutional prohibition against impairment of obligations of contract. The Court found the act, for the purpose of constitutional analysis, analogous to acts of limitation. The Court concluded that the Legislature adopted means which were rationally related to its valid objectives and held that the act did not unconstitutionally impair the obligation of contract.

Recording statutes long have been upheld in the face of constitutional challenges on impairment grounds, see *Jackson* v *Lamphire,* 28 US 280; 7 L Ed 679 (1830). The re-

quirement of periodic recording furthers valid state interests. "The measure taken * * * was a mild one indeed, hardly burdensome to the purchaser * * * but nonetheless an important one to the State's interest", *El Paso, supra,* 516-517.

We hold that MCL 554.291 *et seq.;* MSA 26.1163(1) *et seq.* does not unconstitutionally impair the obligation of contract.

IV.

Defendants claim the act violates the constitutional protection against deprivation of property without due process of law, US Const, Am XIV, Const 1963, art 1, § 17. Defendants argue that by making a corporeal hereditament subject to abandonment the act has unconstitutionally changed the nature of defendants' interests and by requiring a record owner in constructive possession to take specific actions to preserve the interest, the act has unconstitutionally changed a property right into a mere cause of action, see *Groesbeck* v *Seeley,* 13 Mich 329 (1865).[6] Statutes which require property owners *in possession* to institute a proceeding within a specified time or lose their property have been held unconstitutional because a state cannot require one in possession of all that he demands to prosecute a suit to preserve his interest when no adverse interest is asserted by suit or possession, see *Groesbeck, supra,* 343.

Significant differences exist, however, between the dormant mineral act and the statutes which have been held unconstitutional for converting a property right into a

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[6] See, also, *Biltmore Village* v *Royal,* 71 So 2d 727 (Fla, 1954), *Murrison* v *Fenstermacher,* 166 Kan 568; 203 P2d 160 (1949), *Girard Trust Co* v *Pennsylvania R Co,* 364 Pa 576; 73 A2d 371 (1950), Anno: *Constitutionality of a Statute which Reduces Title to Real Estate to a Mere Cause of Action,* 7 ALR2d 1366.

mere cause of action. This act specifically exempts from its abandonment provisions those interests which have been occupied as specified in the act at any time within the last 20 years. More importantly the act does not require the owner to institute a suit (at a time when conceivably there is no one to sue) to preserve title to the interest. The act only requires the owner to record a notice of his claim every 20 years. Although the validity of such recording requirements will be discussed more thoroughly *infra*,[7] it is sufficient to recognize at this point that statutes imposing recording requirements have been upheld when a reasonable time is provided for recording existing interests, see *Wichelman* v *Messner*, 250 Minn 88; 83 NW2d 800 (1957). We therefore hold that the act does not unconstitutionally change defendants' property rights into mere causes of action.

However, the act does convert a corporeal hereditament which at common law could not be abandoned into an interest which is subject to abandonment. Whether this change constitutes a deprivation of property without due process depends upon whether it was a proper exercise of the state's police powers, see *Wyant* v *Director of Agriculture*, 340 Mich 602, 608; 66 NW2d 240 (1954).

Defendants claim that the act is unreasonable, arbitrary and capricious, and not a proper exercise of the police power. Accordingly, they carry the burden of overcoming the presumption of constitutionality[8] and must prove either that no public purpose is served by the act or that no reasonable relationship exists between the remedy

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[7] See Part IV B, *infra*.

[8] See *Shavers* v *Attorney General*, 402 Mich 554, 613; 267 NW2d 72 (1978), *Michigan Canners & Freezers Ass'n, Inc* v *Agricultural Marketing & Bargaining Board*, 397 Mich 337, 343-344; 245 NW2d 1 (1976), *Thayer* v *Dep't of Agriculture*, 323 Mich 403, 411; 35 NW2d 360 (1949).

adopted and the public purpose sought to be achieved.[9] The presumption of constitutionality favors validity and if the relationship between the statute and public welfare is debatable, the legislative judgment must be accepted, see *Grocers Dairy Co* v *Dep't of Agriculture Director*, 377 Mich 71, 76; 138 NW2d 767 (1966), *Carolene Products Co.* v *Thomson*, 276 Mich 172, 178; 267 NW 608 (1936).

A.

Defendants claim that no valid public purpose is furthered by the act because at the time of its enactment the fuel crisis and need for developing oil and gas resources were not critical. However, the clear purpose of the act is to facilitate the development of oil and gas resources, see *Van Slooten, supra*, 446, Street, *Need for Legislation to Eliminate Dormant Royalty Interests*, 42 Mich State Bar J 49 (March, 1963).[10] The importance of facilitating the development of oil and gas resources was recognized long before the current "energy crisis".[11] Defendants' argument that encouraging the development of oil and gas resources is not a valid public purpose is not persuasive.

Although the most apparent benefactor of the act is the owner of the surface estate who may receive title to the interest upon the owner's failure to record, others will also

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[9] See *Shavers, supra*, 612, *Michigan Canners, supra*, *Grocers Dairy Co* v *Dep't of Agriculture Director*, 377 Mich 71, 76; 138 NW2d 767 (1966).

[10] See Minn Stat Ann § 272.039 which declares that one of its purposes is to cure problems in "identification of separately owned mineral interests by taxing authorities requir[ing] title searches which are extremely burdensome and, where no public tract index is available, prohibitively expensive." See, also, Minn Stat Ann § 93.52, NC Gen Stat §§ 1-42.1—1-42.3.

[11] See Veasey, *Law of Oil and Gas*, 18 Mich L Rev 445 (1920).

benefit from the act. The primary purpose of the act is not to vest title to the severed interests in the surface owner but rather is to facilitate development of those subsurface properties by reducing the problems presented by fragmented and unknown ownership. The act as a whole works to the benefit of the public by improving the marketability of severed mineral interests and thereby increasing the development of fossil fuels, the revenues from property taxes, and employment with its related benefits. Defendants have not demonstrated that the act is unconstitutional because of the absence of a valid public purpose.

B.

Defendants also argue that no reasonable relationship exists between the remedy adopted and the public purpose to be achieved because the act does not facilitate the development of mineral estates. Further, they contend that in purporting to transfer title to the owner of the surface estate, the act does not facilitate negotiations and development but actually hinders them by removing the developer's security in dealing with an owner of record. In any event, defendants argue, it would be more logical to vest title to the abandoned estate in the owner of the nearest active mineral estate rather than the owner of the surface estate.

Contrary to defendants' contentions, we conclude that a reasonable relationship exists between the remedy adopted and the public purpose sought to be achieved. The commercial nature of, and common-law rules relating to, severed mineral interests have created significant problems for one attempting to secure title to, or permission to develop, a severed mineral interest.

Upon severance of the surface and mineral estates, the ownership of the mineral estate often becomes fraction-

alized with the passage of time.[12] The commercial nature of these interests make it likely that they may be owned by a number of people who are not familiar with the property, the owner of the surface estate or even each other. Moreover, in the absence of a recording statute, there are no countervailing influences in the law to reduce or limit the tendency of these fractional interests to be owned by unknow or unlocatable owners. Unlike incorporeal interests, corporeal interests cannot be abandoned under the common law.[13] Furthermore, absent actual possession of the severed mineral estate, possession of the surface estate pursuant to a deed reserving a severed mineral interest cannot ripen into adverse possession of the mineral estate.[14] Also, in the absence of actual development of the severed mineral estates (the act would then be inapplicable), it is unlikely that property tax assessment rolls will contain the

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[12] Frequently, portions or fractional interests in these severed oil interests are divided among several persons in attempts to spread the cost of their acquisition or to limit the risks assumed by each individual. Interests may also become fractionalized as their owners sell portions of them for profit as opposed to profiting from the development and sale of the oil. Distributions following the death of an interest holder also tend to create fractional interests owned by a number of persons, see Kuntz, *Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest*, 22 Institute on Oil & Gas Law & Taxation 81 (1971).

[13] See fn 3, *supra*.

[14] 1 Williams & Meyers, *supra*, § 224.1, p 339, Kuntz, *Adverse Possession of Severed Mineral Interests*, 5 Rocky Mountain Mineral Law Institute 409 (1959), Case Note, *Mines and Minerals—Oil and Gas—What Constitutes Adverse Possession of Severed Mineral Interest by Surface Possessor*, 17 Ala L Rev 126 (1964). Anno: *Acquisition of Title to Mines or Minerals by Adverse Possession*, 67 ALR 1440, supplemented in 35 ALR2d 124. See Ga Code Ann § 85-407.1 which changes these common-law rules in an attempt to cure problems caused by dormant mineral interests.

names of their owners.[15] Accordingly, the title to the severed mineral estate tends to become fractionalized over time and increases the likelihood that a potential developer will not be able to locate the owners of the interest to make the conveyance necessary to begin the development process. Without a recording requirement, the task of locating the necessary owners may be impossible or prohibitively expensive.[16] Moreover, the alternative of attempting to develop the mineral interest without the owner's consent is not attractive.[17]

Therefore, the dormant mineral act was passed to reduce the likelihood that the presence of unknown or unlocatable

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[15] See Minn Stat Ann § 272.039, Roberton, *supra*, 1231, Street, *Need for Legislation to Eliminate Dormant Royalty Interests*, 42 Mich State Bar J 49 (March, 1963). See, also, Minn Stat Ann §§ 272.04, subd 1; 273.13, subd 2a, Wis Stat Ann § 700.30, which attempt to cure problems caused by dormant mineral interest by taxing them.

[16] See 1 Williams & Meyers, *supra*, § 224.1, p 345. Given the risks involved in the exploration for oil resources and the uncertainty of whether any recovery will be realized, any significant increase in prepartory costs may become prohibitive.

[17] In proceeding without the owner's consent, all risks and expenses are assumed by the developer. If oil is discovered and the operation is successful, the owner can sue in trespass and recover either the value of the resources or their value minus the expenses of recovery depending on whether the trespasser acted in good or bad faith, see 1 Williams & Meyers, *supra*, § 226, p 372. In any event, the developer assumes all the risks in attempting to recover the oil. Furthermore, if the attempt at recovery is unsuccessful, the developer not only bears all the expenses but may be sued for damages caused by impairing the land's speculative value as a potential oil source, see *Humble Oil & Refining Co* v *Kishi*, 276 SW 190, 191 (Tex Comm App, 1925), Kuntz, *Old and New Solutions*, *supra*, 86-88, Roberton, *supra*, 1232-1233, 1 Williams & Meyer, *supra*, § 229, p 401.

owners or fractionalized ownership of severed interests would unnecessarily hinder or prevent the development of these resources by requiring an owner to do certain specified acts indicating ownership or record a claim of interest every 20 years. It places no undue burden upon owners. Without such a requirement, knowledge of the ownership could be lost in time. Potential resources go undeveloped in the absence of viable ownership.

The recording provision of the act provides a simple method by which owners of undeveloped severed mineral interests can preserve them. Statutes imposing recording requirements have been upheld when a reasonable time is provided for the recording of existing interests, see *Wichelman, supra.* Even before the adoption of US Const, Am XIV, the United States Supreme Court upheld the constitutionality of a recording statute, stating:

"It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; *and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fradulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts*; such too is the power to pass acts by limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned.

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"As this court is confined to the consideration of only one question growing out of this law, we do not think it necessary to examine its provisions in detail: it is sufficient to say, that we can see nothing in them inconsistent with the constitution of the United States, or the principles of sound legislation. *Whether it is considered as an act of*

limitations, or one in the nature of a recording act, or as a law sui generis, called for by the peculiar situation of that part of the state on which it operates; we are unanimously of opinion, that it is not a law which impairs the obligation of a contract". Jackson v *Lampshire, supra,* 290-291. (Emphasis added).

Given that a state has the power to require the recording of an interest as a condition to preserving title to the interest when no recording was required at the time the interest was created, the defendants have not demonstrated that due process prohibits a state from requiring further periodic rerecording to achieve similar objectives,[18] see *Evans* v *Finley,* 166 Or 227; 111 P2d 833 (1941), *Opinion of the Justices,* 101 NH 515; 131 A2d 49 (1957), *Wichelman, supra,* Simes & Taylor, Improvement of Conveyancing by Legislation (Ann Arbor: University of Michigan Law

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[18] In analogizing the dormant mineral act to a recording statute, one must recognize that differences exist between them. Although both may operate to divest an owner of his title, the recording act was designed to protect bona fide purchasers while the dormant mineral act may favor one who has never claimed an interest in the mineral estate.

It is sufficient to note at this time that the acts further different objectives. The dormant mineral act was designed to remedy problems that were not addressed by the recording act. The recording act eliminated many of the problems relating to bona fide purchasers. Any purchaser of these lands will have record notice of the severed mineral interests.

The dormant mineral act was designed to increase the marketability of these mineral interests by requiring periodic recording to reduce the problems caused by owners whose identity and location are unknown. Recognizing that increasing marketability or removal of fetters to marketability are valid public purposes, we are persuaded that the requirement of periodic recording is as reasonably related to this objective as the original recording requirement is related to the objective or protecting bona fide purchasers.

School, 1960), p 268. There is nothing inherent in a recording act which mandates that a recording be eternally effective, see *American Land Co* v *Zeiss*, 219 US 47; 31 S Ct 200; 55 L Ed 82 (1911). The utility and benefits of requiring periodic recording of interests in land are well-recognized. For these reasons we conclude that a reasonable relationship exists between the act's requirement that an owner take possession of the interest in a manner specified or record a claim of interest every 20 years and the public purpose sought be achieved.

A reasonable relationship also exists between the purpose of the statute and the provisions vesting title of the severed interest in the owner of the surface estate upon the failure to do any of the statutorily required acts. It places the title to the interest in one more likely to be located than the owners of the mineral interest. Potential developers, owners of other severed interests, and the owners of the surface estate are then in a position to begin the preparatory steps necessary for development. Similar results follow upon abandonment of other incorporeal mineral interests in other states,[19] and under common-law concepts of adverse possession.[20] Although vesting title in the owner of the surface estate does not guarantee that the interest's potential for development will be realized, the act was not designed to remove all possible impediments to development.[21] Its purpose is to limit the difficulties presented by unknown or unlocatable owners.

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[19] In civil-law jurisdictions the title to abandoned severed mineral interests vest in the owner of the estate from which they were carved, see La Civ Code Ann arts 753, 3546. The same result occurs upon the abandonment of incorporeal interests in land at common law, see *Gerhard, supra.*

[20] See Anno, 35 ALR2d, *supra*, 124, 129, 173.

[21] The act is merely one portion of the Legislature's efforts to remove and regulate unwarranted impediments to the development of oil resources, see MCL 319.1 *et seq.*; MSA 13.139(1) *et seq.*, MCL 319.101 *et seq.*; MSA 13.140(1) *et seq.*

While recognizing that it may be just as logical to vest title in the owner of the nearest active mineral estate or in the state,[22] or to provide that the state hold and sell the interest for the benefit of the owners,[23] we also must recognize that possible alternatives do not render the act unconstitutional. "[I]f the relation between the statute and the public welfare is debatable, the legislative judgment must be accepted," *Carolene Products Co* v *Thomson, supra,* 178.

V.

Defendants argue that the act violates due process by creating an arbitrary and unreasonable conclusive presumption of abandonment, see *Heiner* v *Donnan,* 285 US 312; 52 S Ct 358; 76 L Ed 772 (1932), *Detroit* v *Bowden,* 6 Mich App 514; 149 NW2d 771 (1967), *lv den* 379 Mich 772 (1967).

The essential elements of abandonment are an intention to relinquish the property and acts putting that intention into effect, see *Log-Owners' Booming Co* v *Hubbell,* 135 Mich 65, 69; 97 NW 157 (1903), *Emmons* v *Easter,* 62 Mich App 226; 233 NW2d 239 (1975). Defendants claim that the actions listed in the act are not the only means by which one can possess or indicate ownership of a severed mineral estate and that the failure to do any of the acts specified in the statute is not necessarily determinative of an owner's intent to abandon. Because abandonment is concerned with the owner's intent to abandon, due process for-

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[22] See *Derry* v *Ross,* 5 Colo 295 (1880), Minn Stat Ann § 93.55, 1 Am Jur 2d, Abandoned Property, § 6, pp 8-9. At common law, abandoned property was not the subject of escheat, but was subject to appropriation by the sovereign as *bona vacantia,* see *Anderson National Bank* v *Luckett,* 321 US 233, 240; 64 S Ct 599; 88 L Ed 692 (1944).

[23] See MCL 319.108; MSA 13.140(8).

Even *arguendo* accepting defendants' characterization of the abandonment provisions as a presumption, the act does not create an unconstitutional presumption. A statutory presumption violates due process if there is no rational connection between the facts established and the facts to be presumed.[25] Although the failure to occupy or develop a mineral interest for an extended length of time would not, in itself, be sufficient to support a finding of abandonment at common law, see *Doty* v *Gillett*, 43 Mich 203; 5 NW 89 (1880), it is within the Legislature's power and experience to conclude that the owners who have not developed, transferred or recorded their severed mineral interests for over 20 years have abandoned them.[26] Although some owners who have not completed any of the requirements specified in the act may have never intended to abandon their interests, defendants have not demonstrated that the presumed fact is not "more likely than not to flow from the proved fact".[27] Considering the nature of the interests af-

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claim affected by the acts are different, the two acts have similar objectives and requirements and both lead to substantially the same result.

[25] See *Cleveland Board of Education* v *La Fleur*, 414 US 632; 94 S Ct 791; 39 L Ed 2d 52 (1974), *United States Dep't of Agriculture* v *Murry*, 413 US 508; 93 S Ct 2832; 37 L Ed 2d 767 (1973), *Vlandis* v *Kline*, 412 US 441; 93 S Ct 2230; 37 L Ed 2d 63 (1973), *Bell* v *Burson*, 402 US 535; 91 S Ct 1586; 29 L Ed 2d 90 (1971), *Heiner* v *Donnan*, 285 US 312; 52 S Ct 358; 76 L Ed 772 (1932), see, also, *Leary* v *United States*, 395 US 6, 36; 89 S Ct 1532; 23 L Ed 2d 57 (1969), *People* v *Gallagher*, 404 Mich 429, 438; 273 NW2d 440 (1979).

[26] Although not controlling, the relevancy of such failures is demonstrated by other states' statutes which deem the interest abandoned after non-use over an extended period of time, see Ill Ann Stat, ch 30, § 197 (Smith-Hurd) (25 years), Ind Code Ann § 32-5-11-1 (Burns) (20 years), Neb Rev Stat § 57-229 (23 years).

[27] *Leary, supra*, 36.

bi[illegible] the taking of property on the basis of a permanent and irrebuttable presumption of abandonment which is "not necessarily or universally true in fact", they argue. See *Vlandis* v *Kline*, 412 US 441, 452; 93 S Ct 2230; 37 L Ed 2d 63 (1973).

Contrary to defendants' arguments, the act does not create any evidentiary presumption. None of the provisions of the act purport to be concerned with the owner's intent to abandon, compare *Vlandis, supra*, 452; *Weinberger* v *Salfi*, 422 US 749, 770-772; 95 S Ct 2457; 45 L Ed 2d 522 (1975). Rather, the act is designed to increase the marketability and development of severed mineral interests by creating a rule of substantive law which requires owners to undertake minimal acts indicative of ownership at least every 20 years. The statutory approach to these issues has the added advantage of eliminating uncertainty and minimizing litigation,[24] see *In re Mercure Estate*, 391 Mich 443, 448; 216 NW2d 914 (1974).

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[24] The same result could have been achieved without any reference to the concept of abandonment by "deeming the owner of the surface estate to have marketable record title to the severed interest" at the expiration of the statutory period, see MCL 565.101 *et seq.*; MSA 26.1271 *et seq.*, see, also, NC Gen Stat §§ 1-42.1—1-42.3, SD Compiled Laws Ann § 43-30-8.1. Marketable title acts have been upheld in the face of constitutional challenges, see *Miami* v *St Joe Paper Co*, 364 So 2d 439 (Fla, 1978), *Tesdell* v *Hanes*, 248 Iowa 742; 82 NW2d 119 (1957), *Wichelman* v *Messner*, 250 Minn 88; 83 NW2d 800 (1957), Aigler, *Constitutionality of Marketable Title Acts*, 50 Mich L Rev 185 (1951), supplemented in 56 Mich L Rev 225 (1957), Note, *Constitutionality of Marketable Title Legislation*, 47 Iowa L Rev 413 (1962). Although the dormant mineral act does not attempt to cure problems caused by conflicting claims in the same chain of title, its purpose is similar to the purpose of the marketable title acts in that it is designed to remove impediments to a severed mineral interests title's marketability caused primarily by the presence of unknown or unlocatable owners of undeveloped interests. Although the source of the

fected by the act and the rational connection existing between the proven facts and the determination of abandonment, defendants have not demonstrated that the act denies them due process of law by creating an unconstitutional presumption.

VI.

Defendants also claim that the act violates due process because it contains no provisions for notice [28] or a hearing to determine the validity of the "abandonment" before the title vests in the owner of the surface estate, see *Contos* v *Herbst*, 278 NW2d 732, 743 (Minn, 1979); *Wheelock* v *Heath*, 201 Neb 835, 844; 272 NW2d 768 (1978).

It has been repeatedly observed that due process requires that one deprived of liberty or property be afforded notice and an opportunity for a hearing held "at a meaningful time and in a meaningful manner" [29] and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situ-

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[28] The act, itself, provides sufficient notice of its recording requirements, see *Anderson National Bank* v *Luckett*, *supra*, 243, *North Laramie Land Co* v *Hoffman*, 268 US 276, 283; 45 S Ct 491; 69 L Ed 953 (1925), *Grand Rapids Independent Publishing Co* v *Grand Rapids*, 335 Mich 620, 630; 56 NW2d 403 (1953), *Wichelman*, *supra*, 110, *Presbytery of Southeast Iowa* v *Harris*, 226 NW 2d 232 (Iowa, 1975), 58 Am Jur 2d, Notice, § 21, p 503, 66 CJS, Notice, § 13, p 650, but see *Contos* v *Herbst*, 278 NW2d 732 (Minn, 1979). The discussion of notice in this section concerns notice as it relates to an opportunity for a hearing, see *Mullane* v *Central Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950).

[29] *Armstrong* v *Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965), see, also, *Rockwell* v *Crestwood School Dist Board of Education*, 393 Mich 616, 634; 227 NW2d 736 (1975).

ation".[30] As the scope and extent of the due process protections have been drawn into sharper focus in recent cases concerning the requirement of a pre-deprivation hearing, it has been recognized that the constitutional necessity for such a hearing is determined by balancing the competing interests at stake, see *Arnett* v *Kennedy*, 416 US 134, 212; 94 S Ct 1633; 40 L Ed 2d 15 (1974) (Marshall, J., dissenting with Brennan and Douglas, JJ.), *Rockwell* v *Crestwood School Dist Board of Education*, 393 Mich 616, 634; 227 NW2d 736 (1975). The predominant interests secured by a pre-deprivation hearing are protection against wrongful deprivation and, assuming ultimate vindication of the owner, protection against unnecessary interim damages, see *Rockwell, supra*, 635. When the risks from wrongful deprivation are significant, a pre-deprivation hearing is required in the absence of any countervailing considerations, see *Contos, supra*, 744, *Fuentes* v *Shevin*, 407 US 67, 82; 92 S Ct 1983; 32 L Ed 2d 556 (1972), *Boddie* v *Connecticut*, 401 US 371, 378-379; 91 S Ct 780; 28 L Ed 2d 113 (1971).

However, considering the interests encompassed by this act, the risks of wrongful deprivation are minimal. The act does not deprive owners of productive interests of their property without a hearing[31] but only applies to severed interests which have not been worked, as defined in the act, or recorded for over 20 years. Therefore, since the owner has not been in actual possession of the interest for over 20 years, the risks of financial or other harm from the

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[30] *Cafeteria & Restaurant Workers Union* v *McElroy*, 367 US 886, 895; 81 S Ct 1743; 6 L Ed 2d 1230 (1961), see, also, *Rockwell, supra*.

[31] Compare Minn Stat Ann §§ 93.55, 272.039 which apply to productive as well as nonproductive interests and were held unconstitutional in *Contos* v *Herbst, supra*. See, also, Wis Stat Ann § 700.30.

interim deprivation are minimal.[32] Moreover, a pre-deprivation due process hearing would not necessarily give the owner an opportunity to claim the interest, record it and preserve it[33] but would only address the issue of whether the elements of abandonment had been proven. Balancing the minimal protection afforded by requiring a pre-deprivation hearing against countervailing considerations,[34] the legislative determination not to require a pre-deprivation hearing did not deprive defendants of property without due process of law.

Furthermore, the act does not limit the owner's opportunity for a hearing to determine whether the statutory requirements have been met and to ascertain the ownership of the property.[35] Although a pre-deprivation hearing is

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[32] Although the Supreme Court in *Fuentes* v *Shevin*, 407 US 67, 88-90; 92 S Ct 1983; 32 L Ed 2d 556 (1972), rejected the argument that a prior hearing was required only when "necessities" were involved and quoted from Justice Harlan's concurring opinion in *Sniadach* v *Family Finance Corp of Bay View*, 395 US 337, 342; 89 S Ct 1820; 23 L Ed 2d 349 (1969), that some form of notice and a hearing is required before deprivation of a property interest that "cannot be characterized as *de minimis*", this act applies only to dormant interests which have not been used or recorded for a period of over 20 years and are deemed abandoned. Since the owner has abandoned the property under the statute, those provisions of the act which vest title to the severed interest in the surface owner deprive him of nothing, see *Mullane, supra*. For these reasons we hold that the statute does not deny defendants of their property without due process of law, see *Wichelman, supra*, 110, *Presbytery of Southeast Iowa* v *Harris, supra*, 242, contra, *Wheelock, supra*, 845.

[33] But see, *Wheelock, supra*.

[34] See Bubalo, *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act*, 12 Ind L R 454, 472-473 (1979).

[35] Compare, Minn Stat Ann § 93.55, *Contos, supra*, 742.

not required, there exists an opportunity for a hearing to be held at a meaningful time. For these reasons, we hold that due process does not require a hearing prior to vesting title in the owner of the surface estate, see *Short, supra,* contra, *Wilson* v *Bishop,* —— Ill 2d ——; —— NE2d —— (1980).

Because the due process guarantees do not require a hearing prior to vesting title in the owner of the surface estate, we do not accept defendant's claim that the absence of any provision in the statute for *notice* of such a hearing renders it constitutionally infirm. The constitutional right to notice of a hearing is implicit in and dependent upon a right to an opportunity for a hearing. No such hearing is provided for or required by the statute; therefore it is not unconstitutional on the basis that it does not have adequate provisions for notice of such a hearing.

VII.

We summarily reject defendants' equal protection claims, US Const, Am XIV, Const 1963, art 1, § 2. The Equal Protection Clause does not require the Legislature to address every aspect of a problem at once or do nothing at all, *O'Donnell* v *State Farm Mutual Automobile Ins Co,* 404 Mich 524, 543; 273 NW2d 829 (1979). Defendants have failed to show that treating oil and gas interests differently from "hard" minerals is arbitrary or lacks a reasonable relation to the object of the legislation, see *Forest* v *Parmalee,* 402 Mich 348; 262 NW2d 653 (1978), *McAvoy* v *H B Sherman Co,* 401 Mich 419, 453-454; 258 NW2d 414 (1977).

We hold that the act is not unconstitutional as applied in these cases. The Court of Appeals decision in *Bickel* is reversed, and in *Van Slooten* is affirmed. Remanded for further proceedings consistent with this opinion.

No costs, this being a public question.

STATE OF MICHIGAN
SUPREME COURT

No. 62256

H. JOHN VAN SLOOTEN, *Plaintiff-Appellee,*

v.

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAYE PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LESTER TEATER: unknown claimants, unknown owners; and any and all unknown heirs, devisees, legatees, and assignees of NELLIE F. GILL, deceased,
Defendants-Appellants.

No. 61917

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, a Delaware Corporation, SKELLY OIL COMPANY, a Delaware Corporation, TOTAL LEONARD, INC., a Michigan Corporation, THE DOW CHEMICAL COMPANY, a Delaware Corporation, SAXON OIL COMPANY, a Texas Corporation,
Plaintiffs-Appellants,

v.

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware Corporation, DELORES M. COOK, d/b/a SOUTHWESTERN OIL COMPANY, *Defendants-Appellees.*

BEFORE THE ENTIRE BENCH

LEVIN, J (to reverse *Van Slooten* and affirm *Bickel*)

Our state constitution provides that "[n]o * * * law impairing the obligation of contract shall be enacted." [1] The

[1] Const 1963, art 1, § 10.

United States constitution provides that "[n]o state shall • • • pass any • • • law impairing the obligation of contracts." [2] While deciding these cases under our state Contract Clause, we are counseled by decisions of the United States Supreme Court interpreting the federal clause.

I

Modern construction of the Contract Clause was forged under the pressure of legislative efforts to deal with the Depression. A balancing approach was used, preserving the power of the states to act for the public good while limiting that power in order to implement the purposes of the clause. Thus, in the leading case of *Home Building & Loan Ass'n* v *Blaisdell*,[3] the Court upheld a Minnesota mortgage moratorium law although the law impaired the contractual foreclosure rights of lenders. The Court found five factors critical. First, the legislature had declared, with adequate basis, an emergency need for the moratorium legislation.[4] Second, the law was addressed to the protection of a basic interest of society rather than to the advantage of particular individuals.[5] Third, the relief afforded was tailored to the emergency.[6] Fourth, the legislation was reasonable. In particular, it preserved the integrity of the mortgage indebtedness, provided rental compensation to the mortgagee during the moratorium, and preserved the primary concern of mortgagees—reasonable

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[2] US Const, art I, § 10.

[3] *Home Building & Loan Ass'n* v *Blaisdell*, 290 US 398; 54 S Ct 231; 78 L Ed 413; 88 ALR 1841 (1934).

[4] *Id*, pp 444-445.

[5] *Id*, p 445.

[6] *Id*.

protection of their investment security.[7] Finally, the legislation was limited in time to the duration of the emergency.[8]

In a trio of subsequent cases, the failure to closely confine the contractual impairments to what was necessary to implement the state's purpose caused legislation to be found invalid under the Contract Clause. In *W B Worthen Co* v *Thomas*,[9] an Arkansas law exempted life insurance proceeds from collection by the beneficiary's judgment creditors. The Court noted that the exercise of a state's reserved powers "must be limited by reasonable conditions appropriate to the emergency," [10] and found the Contract Clause violated because the law had no limits as to "time, amount, circumstances, or need." [11]

In *W B Worthen Co.* v *Kavanaugh*,[12] an Arkansas law impairing the remedies of mortgage bond holders was found to have destroyed "nearly all the incidents that give attractiveness and value to collateral security." [13] The failure to tailor the amount, necessity and duration of relief to the emergency resulted in a finding of invalidity under the Contract Clause.

Finally, in *Treigle* v *Acme Homestead Ass'n*,[14] the Court emphasized the need for a public purpose behind legisla-

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[7] *Id*, pp 445-447.

[8] *Id*, p 447.

[9] *W B Worthen Co* v *Thomas*, 292 US 426; 54 S Ct 816; 78 L Ed 1344 (1934).

[10] *Id*, p 433.

[11] *Id*, p 434.

[12] *W B Worthen Co* v *Kavanaugh*, 295 US 56; 55 S Ct 555; 79 L Ed 1298 (1935).

[13] *Id*, p 62.

[14] *Treigle* v *Acme Homestead Ass'n*, 297 US 189; 56 S Ct 408; 80 L Ed 575 (1936).

tion impairing contracts. There, a Louisiana law altered the withdrawal rights of members of a building and loan association. The Court found that the law merely altered the rights of members *vis-a-vis* each other, without promoting any public purpose.[15] It was thus invalid under the Contract Clause.

This standard for legislation impairing contracts—that the impairment be on reasonable conditions appropriately tailored to the public purpose giving rise to the legislation —has been further clarified in later decisions. Thus, the existence of an emergency and the temporary nature of the legislation, key elements in *Blaisdell*, are not essential preconditions but are, rather, factors to be used in assessing the reasonableness of the legislative impairment of contracts. *United States Trust Co. of New York* v *New Jersey*;[16] *Veix v Sixth Ward Building & Loan Ass'n.*[17] Other factors include the substantiality of the affected contractual term as an inducement to enter the contract, *El Paso* v *Simmons*;[18] the degree to which the legislation is in responce to circumstances unforeseen at the time of contracting and limits a party to his reasonable expectations, *El Paso, supra;*[19] and whether the altered contractual term

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[15] *Cf., Veix* v *Sixth Ward Building & Loan Ass'n of Newark,* 310 US 32; 60 S Ct 792; 84 L Ed 1061 (1940), holding a similar law valid under the Contract Clause and distinguishing *Treigle* by finding a public purpose in controlling withdrawals that threatened the state's credit system.

[16] *United States Trust Co of New York* v *New Jersey,* 431 US 1, 22-23, fn 19; 97 S Ct 1505; 52 L Ed 2d 92 (1977).

[17] *Veix* v *Sixth Ward Building & Loan Ass'n of Newark,* 310 US 32; 60 S Ct 792; 84 L Ed 1061 (1940).

[18] *El Paso* v *Simmons,* 379 US 497, 514; 85 S Ct 577; 13 L Ed 2d 446 (1965).

[19] *Id,* p 515.

was originally based on a statute when the contract was entered. *Veix, supra.*[20]

II

Turning to the present cases, we recognize that courts normally accord considerable deference to legislative assessments of the reasonableness and necessity of economic and social legislation. However, where such legislation impairs contractual obligations, this deference must be harmonized with the court's duty to apply the constitutional prohibition. In considering the factors outlined above, this Court will follow the lead of the United States Supreme Court in *Allied Structural Steel Co* v *Spannaus,*[21] in keying the degree of deference to the severity of the contractual impairment:

> "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." [22]

Our first task, therefore, is to assess the severity of the impairment. The Chief Justice limits the impairment to the new obligation to do one of the specified acts or to record a claim of interest every 20 years to preserve the interest. In so doing, she separates the obligation from the consequences of the failure to meet the new obligation, *i.e.,* forfeiture of the interest. This separation we cannot accept. Had the obligation to re-record already been law, and the Legislature acted to change the consequences from

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[20] *Veix, supra,* p 38.

[21] *Allied Structural Steel Co* v *Spannaus,* 438 US 234; 98 S Ct 2716; 57 L Ed 2d 727 (1978), *reh den,* 439 US 886 (1978).

[22] *Id,* p 245.

a small fine to total forfeiture, could we disregard that alteration when challenged under the Contract Clause? We suggest that we could not. Further, the approach of the Chief Justice is inconsistent with that of the United States Supreme Court. For example, in *Home Building & Loan Ass'n* v *Blaisdell*, 290 US 398; 54 S Ct 231; 78 L Ed 413 (1934), the mortgage moratorium legislation did not alter the mortgage *obligation*—the principal was still due and interest thereon continued to accumulate.[23] What was altered was the *consequences* of the failure to meet the mortgage obligation, namely the foreclosure procedure.

When the impairment in the present case is seen as both the obligation and its consequences, the extreme severity of the impairment is clear. The act does not merely modify the owner's interest, it adds a term providing for its extinguishment. It is difficult, if not impossible, to imagine a greater impairment than one which can operate to void the contract entirely.

While it may be true, as the Chief Justice maintains, that the defendants were not substantially induced to obtain their interests in reliance on the fact that their interests need not be re-recorded, other reliance interests are at stake. Defendants identify three such interests. First is "that title to property will not be disturbed in the absence of a competing claim of title or possession," citing *Groesbeck* v *Seeley*.[24] Second is the expectation that if one's title is challenged or threatened, one will have notice of that challenge. Third is the basic reliance interest embodied in the Clause itself—that the state will not act to impair, and certainly not to void, lawful contracts.

It is useful to compare the impairment of these reliance interests with the impairment found to be severe in *Spannaus*. There the Minnesota Private Pension Benefits Pro-

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[23] *Blaisdell, supra*, p 445.

[24] *Groesbeck* v *Seeley*, 13 Mich 329, 343 (1865).

tection Act[25] retroactively imposed vesting and funding requirements on certain employers' pension plans. The Court found the impairment severe because the additional, sudden contribution obligation "impose[d] a completely unexpected liability in potentially disabling amounts."[26]

Here, as in *Spannaus*, the impairment was unexpected, given the reliance interests noted above. Further, the contract here is threatened not merely by potential destruction, as was the pension plan in *Spannaus*, but with the certainty of extinction. The severity of this impairment clearly pushes our inquiry "to a careful examination of the nature and purpose of the state legislation."[27]

The act has the purpose of encouraging development of oil and gas resources by terminating the ownership interests of inaccessible owners—ones who cannot be found—and vesting ownership in the surface owner. The presence of unknown or unlocatable owners precludes contracts for exploration or development of the oil and gas resources.

We recognize the public purpose behind the legislation, and the fact that encouraging energy development promotes a basic interest of society, rather than of a narrow group.[28] However, we are convinced that, given the severity of the impairment and the lack of reasonable conditions appropriately tailoring the impairment to the public purpose, the balance in these cases must be struck on the side of the Constitution.

First, the act needlessly fails to limit its impact to contracts within its rationale. Termination of the interests of inaccessible owners is reasonable and appropriate to its

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[25] Minn Stat Ann §§ 181B.01-181B.17.

[26] *Spannaus, supra*, p 247.

[27] *Id*, p 245.

[28] *Cf., Spannaus, supra*, pp 247-249; *Blaisdell, supra*, p 445.

purposes, but terminating those of owners who can be located by reasonable diligence is not. The act, however, makes no effort to distinguish the two groups.[29] This over-inclusiveness is analogous to the failure to condition mortgage relief upon a showing of necessity in *W B Worthen Co* v *Kavanaugh, supra,* one factor found to distinguish *Kavanaugh* from *Blaisdell.*[30]

Second, the act's purpose can be achieved by measures short of total forfeiture. A statutory royalty rate might be established, and the owner who fails to make the requisite filings may have a mineral lease at that rate imposed upon him with proceeds to be paid into a custodial trust account. As stated in *United States Trust Co.* v *New Jersey, supra,*[31] in the context of weighing the presence of less drastic impairments, "a state is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."

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[29] Nor can the permanent, irrebuttable presumption of abandonment called for in the act be justified. It is the nature of subsurface interests to lie quiet, without apparent activity or assertions of ownership, until cause for exploration arises. Further, the initiative for action normally lies with the development concern, not the owner. The equating of lack of activity on the part of the owner with abandonment is simply not in accordance with common experience, much less "necessarily or universally true." *Vlandis* v *Kline,* 412 US 441, 452; 93 S Ct 2230; 37 L Ed 2d 63 (1973). Since the act purports to deal exclusively in terms of abandonment, this case is "squarely within *Vlandis* [*supra*] as limited by [*Weinberger* v] *Salfi* [422 US 749; 95 S Ct 2457; 45 L Ed 522 (1975)]". *Elkins* v *Moreno,* 435 US 647, 660; 98 S Ct 1338; 55 L Ed 2d 614 (1978).

[30] *W B Worthen Co* v *Kavanaugh, supra,* p 63.
See also *W B Worthen Co* v *Thomas, supra,* p 434.

[31] *United States Trust Co of New York* v *New Jersey,* 431 US 1, 31; 97 S Ct 1505; 52 L Ed 2d 92 (1977).

We wish to emphasize that we are not attempting to confine the Legislature to these alternatives, nor are we expressing any opinion on the constitutionality of these lesser impairments. We simply cannot ignore the striking absence of any effort to protect the owner's interests under the present scheme. No effort to locate the present owner is called for. No process to notify the owner of the threat to his title is provided. No effort is made to preserve the owner's interest in at least the proceeds of the development. It is this failure to condition the impairment to what is reasonable and necessary to achieve the admittedly valid public purpose of the act that renders it an unconstitutional impairment of contract.

III

While, as a general rule, an unconstitutional statute is void *ab initio* [32] and thus contracts based thereon create no rights or obligations, we agree with the statement in *Chicot County Drainage Dist* v *Baxter State Bank* [33] that "an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

"The actual existence of a statute, prior to * * * a determination [of unconstitutionality], is an operative fact and may have consequences which cannot be ignored." [34]

Here we deal with a statute enacted 17 years ago. Leases may have been entered and costly exploration and development may have been made in reliance on statutory forfeitures dating back 14 years. Such reliance would have been in direct furtherance of the basic legislative goal—development of energy resources. We feel that such good-

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[32] *Stanton* v *Lloyd Hammond Produce Farms*, 400 Mich 135; 253 NW2d 114 (1977).

[33] *Chicot County Drainage Dist* v *Baxter State Bank*, 308 US 371, 374; 60 S Ct 317; 84 L Ed 329 (1940).

[34] *Id.*

faith reliance on a presumptively valid statute, in furtherance of the legislative goal, should not be upset by rigid application of retrospective invalidity.

Therefore, where a development concern has entered a lease with a surface owner in reliance on a forfeiture under the act, the lessee's rights under the lease should not be voided unless action in reliance on the lease has been minimal. However, future payments under the lease to the surface owner, rather than to the rightful owner of the sub-surface interest, cannot be justified. The rights to past payments will depend upon a balancing of the equities involved. Thus it follows that in *Van Slooten*, where the leases have been executed by the sub-surface owners, the leases should not be upset by the surface owner claiming under the unconstitutional statute.

Where different development concerns have entered competing leases, as in *Bickel*—one with the surface owners and the other with the sub-surface owners—the situation is more difficult. The trial court should assess the equities in light of the differing degrees of action in reliance on the leases and, where the equities are close, give effect to the normal rule of retroactive invalidity.

I would reverse the judgment of the Court of Appeals in *Van Slooten* and affirm in *Bickel*.

APPENDIX B

COURT OF APPEALS OF MICHIGAN

May 22, 1978

Docket No. 77-1225

JOHN E. BICKEL, ETTA MAY BICKEL, GETTY OIL COMPANY, a Delaware Corp., SKELLY OIL COMPANY, a Delaware Corp., TOTAL LEONARD, INC., a Michigan Corp., the DOW CHEMICAL COMPANY, a Delaware Corp. and SAXON OIL COMPANY, a Texas Corp., *Plaintiffs-Appellants,*

v.

JAMES I. FAIRCHILD, WINIFRED FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware Corp., DOLORES M. COOK, d/b/a SOUTHWESTERN OIL COMPANY,
Defendants-Appellees.

Before V. J. BRENNAN, P.J., and D. E. HOLBROOK and MARTIN, JJ.

R. B. MARTIN, Judge.

The parties agree on the following facts: On August 16, 1944, Isabelle Worth deeded real estate to James and Grace Fairchild, reserving minerals, oils, gases, ores and stone. On February 14, 1956, Isabelle Worth died Carl and Doris Worth are her successors in interest. On April 5, 1971, James and Winifred Fairchild, husband and wife, conveyed to John and Etta Bickel, husband and wife. The grantors here, likewise, reserved minerals, oils, gases, ores and stone.

On January 30, 1973, Carl and Doris Worth granted an oil and gas lease to Shell Oil Company.

On September 4, 1974, the Fairchilds granted an oil and gas lease to Dolores Cook.

On November 1, 1974, the Bickels leased oil and gas rights to Getty Oil Company, Skelly Oil Company, Total Leonard, Inc. and Dow Chemical. Getty Oil and Skelly thereupon assigned part of their interest to Saxon.

Plaintiffs brought suit to quiet title to their oil and gas interests under the Dormant Mineral Act, M.C.L. § 554.291, *et seq.;* M.S.A. § 26.1163(1), *et seq.* The Fairchilds and Dolores Cook, by cross-complaints, asserted their rights against all the others.

The trial court, on motions for summary judgment, found Shell Oil Company was the leasehold owner of all the oil and gas rights in the property. All other claimants were denied any interest. Plaintiffs appeal.

This suit tests the constitutionality of the Dormant Mineral Act. We commence by saying that we need not and do not decide the constitutionality of the prospective provisions of the Act. The statute was 1963 P.A. 42 and became effective September 6, 1963. It provides that any person holding any interest in oil or gas in any land, other than the surface owner, shall be deemed to have abandoned such interest unless during any 20 year period such person relative to the land does one of five things:

(1) Secures a drilling permit, or

(2) actually produces or withdraws gas or oil individually or as part of a pool; or

(3) sells, leases, mortgages or transfers such interest by a recorded instrument; or

(4) uses the property subject to such interests for underground gas storage; or

(5) records a notice of interest with the Register of Deeds.

A three-year grace period was provided by the Act for persons affected to record their notice to preserve their interests.

The parties agreed that Isabelle Worth and her successors did none of the 5 things above for a period of 20 years. The record shows the January 30, 1973, lease to Shell Oil was recorded on February 20, 1973.

We agree with appellants that in our energy short and energy conscious generation, the legislative act has a real public purpose—to encourage exploration and drilling of new gas and oil wells. Some oil and gas rights, with the passage of time, have become fractionalized and distributed among numerous owners, many who are no longer locatable and perhaps even deceased. No oil company will spend the time and expense of tracing all the possible owners down in order to do expensive exploratory drilling with no guarantee of favorable results.

On the other hand, the gas and oil interest holders have a property right given them by private publicly recorded contracts. These rights are subject to being sold, mortgaged, leased, devised or inherited just as the surface rights are. Whose rights are paramount, the state's or the individual's?

A line of cases has discussed the evolution of the doctrine that some impairment of contracts is permissible under the Federal constitution. The basic one is *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934). It contained a vigorous 4 vote dissent. The court was confronted with the Minnesota statute giving additional time for redemption from mortgage foreclosure sales during the depression. Such time was given under strict conditions and the statute was to be effective only for a few years.

The majority felt the state reserved the power to protect itself and to act in the best interests of all of its people. This reservation was a part of every contract. The constitutional prohibition of impairment of contract was ". . . not an absolute one and is not to be read with literal exact-

ness like a mathematical formula". Some criteria was used in determining whether the state could impair the obligation of the contract: (1) the Legislature and the state supreme court found a grave emergency existing requiring state help, (2) the impairing statute was to help the basic interest of society and not just a few individuals, (3) the relief granted was appropriate to the need and granted on reasonable conditions, and (4) the legislation was temporary and with a short given limit in time. We note also that the statute gave some added protection to the mortgagees who were the parties being deprived of their right to enforce their original contract.

In *El Paso v. Simmons*, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965) Texas, by statute, sold land to raise money for schools. The buyers paid very little down and were obligated to pay very little for a long term of years. If the buyers forfeited their rights because they failed to make payments, they were given an unlimited right to redeem by catching up. When oil and gas discoveries and an increasing population made speculation in oil and gas rights a very profitable thing, the statute was amended to require redemption in five years and the only ones given a right of redemption were the last contract vendees. This was upheld by the United States Supreme Court on the basis of *Home Building, supra.* The court believed the statute was "quite clearly necessary" and the measure was a mild one and not too much of a hinderance to the purchaser.

Justice Black dissented. He felt the state could not make a contract under a statute and then by statute repudiate the contract without compensating the injured party. He saw no reason to adopt the balancing principle of *Home Building.*

The United States Supreme Court in *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) found an unconstitutional impairment of contract. There the states of New York and

New Jersey had, by statute, given bond holders certain rights to a port authority's revenues. Twelve years later they repealed that statute. By a 4 to 3 vote the court found it was an unconstitutional impairment of contract. The dissent balanced the rights of the government and the bond holders and found the new statute did no real harm to the bond holders and should be upheld.

Our Court has dealt rather comprehensively with the subject in *Washtenaw Community College Education Association v. Board of Trustees of Washtenaw Community College,* 50 Mich.App. 467, 213 N.W.2d 567 (1973). It accepted the theory of balancing of rights and interests in determining whether a contract could be impaired.

In our particular case, the statute would deprive known property owners of their sub-surface rights without notice, hearing or compensation. The statute was passed in 1963. This was long before any real fossil fuel crisis in this country. By its provisions, it required the Worths to do something affirmatively within three years or lose their property. When the Act became effective as to Isabelle Worth's successors in interest, there was no grave state emergency requiring state help. The Act, at that time, was aimed at helping a few individuals or companies and not all of society. The relief granted could reasonably have required some notice to known interest owners. The relief was not temporary or for a limited time. The property owners' rights were not protected as they were in the statute in *Home Building.*

Our chief concern here is that the Worths were a known, identifiable, suable interest holder. They had, by contract, certain property interests in the land. Those property interests were known to all of the other parties to this litigation. Why should other parties be given the Worths' property interests because the Worths had not used them or filed a notice they still claimed them? Without any grave emergency situation requiring such drastic action, the stat-

ute would take property obtained by contract from the Worths and give it to others. Through the recorded chain of title, the Worths' contractual rights were recognized by the other claimants.

Even in using the "balancing" idea of *Home Building*, we too must balance certain principals. There is a presumption that legislatively enacted statutes are constitutional. There is a presumption that contracts should not be impaired by legislative acts. Balancing cases have had dissents so the weighing of rights and interests has not always been easy.

We agree with the learned trial judge. The effect and application of this Act as to the defendants at bar is prohibited by our state and federal constitutions as a law impairing the obligation of contract.

Affirmed.

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MONTMORENCY

JOHN E. BICKEL, ETTA MAE BICKEL, GERRY OIL COMPANY, a Delaware Corp., SKELLY OIL COMPANY, a Delaware Corp., TOTAL LEONARD, INC., a Michigan Corp., THE DOW CHEMICAL COMPANY, a Delaware Corp., SAXON OIL COMPANY, a Texas Corporation, *Plaintiffs*

vs.

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware Corp., DELORES M. COOK d/b/a SOUTHWESTERN OIL COMPANY, *Defendants*

OPINION OF THE COURT

This action involves a dispute as to the ownership of oil and gas rights in certain lands located in this county.

Plaintiffs claim title by operation of statute, namely; the *Dormant Mineral Act*, 1963 PA 43 (effective September 6); MCLA 554.291 et seq.; MSA 26.1163 et seq.

Defendants claim title by reservation of same, being made their predecessors in title.

Vested title in defendants, or those claiming thereunder, is conceded; plaintiffs' claim is one of superior title by operation of statute, *supra*.

Both parties concede that no factual dispute exists and each has moved for summary judgment to quiet title. Thus, the sole question for determination, requested of this Court, is constitutionality of the Act, *supra*.

The Act in question, *supra*, so far as material, provides that any person holding any interest in oil or gas in any land, other than the surface owner, shall be deemed to have

abandoned them, if during any twenty (20) year period, they, relative to said lands, fail to:

1) Secure a drilling permit; or,

2) Sell, lease, mortgage or transfer (said rights) by recorded instrument, in absence of a drilling permit; or,

3) Actually produce or withdraw gas or oil; or,

4) Actually use such interest in underground gas storage operations; or,

5) Record a notice of interest claimed with the Register of Deeds in the County wherein the land is located.

A three-year grace period was provided by the Act, effective September 3, 1963, for any person so affected to perform any of the above actions and thereby protect their interest from abandonment for another twenty-year period. 1963 PA 43, § 1; MCLA 554.291; MSA 26.1163. In all other respects, the Act, *supra*, provides for retrospective application.

Defendants, who are or claim under the holders of record title as to the subject oil and gas rights, concede they have failed to perform any of the required actions

Further, the Act is self-executing, insomuch as it provides that upon the oil and gas interest being deemed abandoned, it shall vest in the owners of the surface. 1963 PA 43, § 2; MCLA 554.292; MSA 26.1164. It is under this provision that plaintiffs, as owners of the surface or claiming thereunder, base their claim.

Defendants concede that plaintiffs are within the statute but contend the statute is unconstitutional.

Plaintiffs deny defendants' allegation, claiming among other grounds that the statute is a valid exercise of the police power, with means being employed which are appropriate to the ends sought.

It is elementary that historically in this jurisdiction, oil and gas rights constitute a separate legal estate which may, as in this case, be severed and reserved upon conveyance. Thus, the question to be answered is; Has the legislature, by statute and within constitutional propriety, extinguished this severable, but vested right, as to one party and vested same within another party?

This Court has expended exhaustive research, including extensive study of the briefs and arguments of the parties, without reaching satisfactory conclusion. This Court further finds concern relative to a question touching upon the constitutionality of the subject Act, *supra*, which is not raised in the briefs, as filed herein. The pleadings, nevertheless, sufficiently encompass the question that concerns this Court.

In this regard, it concerns this Court that the Act, *supra*, is in derogation of the common law relative to divestiture of property by abandonment.

> "At common law, perfect legal title to a corporeal hereditament cannot be abandoned." CJS, Abandonment, § 5c.

To the extent of this Court's research, it would appear that the universal rule at common law is to the effect that fee simple ownership of minerals in the ground is a corporeal hereditament. Admittedly, a severance, conveyance or contractual transfer, by the fee owner, of the right to go upon land for the taking of oil and gas, has been construed within some jurisdictions as an incorporeal hereditament, and thus subject to abandonment. Neverthless, it would appear that there is precedent in this jurisdiction to sustain the common law rule, *supra*, *Bonninghausen* v *Hansen*, 305 Mich 595; 9 NW2d 856 (1943), and further precedent to sustain that oil and gas leases are corporeal hereditaments, *Attorney General* v *Pere Marquette RR Co*, 263 Mich 431; 248 NW 860 (1933); *Jaenicke* v *Davidson*, 290 Mich 298; 287 NW 472 (1939); 1 Am Jur 2d, Abandoned Property, § 13, 14.

Further, it is well settled that, at common law, in order to establish an abandonment of property, actual acts of relinquishment accompanied by an intention to abandon must be shown, 1 Am Jur 2d, Abandoned Property, § 15, 16; Michigan Law & Practice, Abandonment, § 2, 3. Also, there can be no abandonment of property if the person having the right or the property is unaware of its existence, *Sabins* v *McAllister*, 116 Vt 302; 76 A2d 106; *Linscomb* v *Goodyear Tire & Rubber Co* (CA 8 Mo) 199 F2d 431, and in this jurisdiction, there is long standing authority that abandonment of interests in real estate cannot be inferred from non user alone.[1] *Doty* v *Gillett*, 43 Mich 203; 5 NW 89 (1880).

Thus, the Act, *supra*, contrary to the common law, provides not only that the vested gas and oil interest is now subject to abandonment, when theretofore it was not, but also now requires affirmative acts to avoid abandonment and has eliminated concurrence of the former necessary elements of intent to abandon.

All of the preceding, this Court finds is specifically contrary to and in derogation of the common law in force at the time of the enactment of the Public Act, *supra*. Namely, prior to September 6, 1963, gas and oil interests were not subject to abandonment or, in the alternative, if subject to abandonment, could not be abandoned in absence of actual acts of relinquishment accompanied by an intention to abandon.

This record is barren of any act of abandonment, as recognized at common law or any expression of intention to abandon, being attributable to defendants herein.

In applying the foregoing findings and conclusions to the case at bar, can it be said that the legislature, by

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[1] *Doty* is distinguishable from *Attorney General, supra*, and *Jaenicke, supra*, in that in *Doty*, a leasehold interest is in dispute.

creation of a new criterion of abandonment, can retroactively divest owners of vested gas and oil rights, of their right under common law to hold said interests free of a claim of abandonment or, in the alternative, to hold them free of a claim of abandonment in absence of actual acts of relinquishment accompanied by an intention to abandon. This Court believes not.

Clearly, the Act, *supra,* by retroapplication divests vested property rights, under a criterion of abandonment, that was not in force at time of passage of the Act.

A further clear effect of the Act, *supra,* is to retroactively divest defendants of their right to dispose of property again by application of the criterion of abandonment not theretofore in effect.

> "The right to dispose of property is substantial and valuable. It is incidental to and inheres in the constitutional right to acquire and own property. It may not be impaired or defeated by legislation after the right has vested." *Pfeifer* v *Ableidinger,* 166 Neb 464; 89 NW2d 568, 578 (1958).
>
> "Courts, as a rule, are loath to give retroactive effect to statutes, expecially where it will disturb contractual or vested rights." *Nash* v *Robinson,* 226 Mich 146; 197 NW 522 (1924).

This Court concludes that the Legislature by the Act of 1963, *supra,* could not lawfully and constitutionally, retroactively deprive defendants of their common law right to hold oil and gas rights, free of a claim of abandonment or, in the alternative, to deprive them of their common law right to hold same free of a claim of abandonment absent a showing of actual acts of relinquishment accompanied by an intention to abandon.

The effect and application of this Act, *supra*, as to the defendants at bar, is prohibited by the Constitution of this State.

> "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const 1963, art I, § 10.

This Court makes no finding as to the prospective application of the statute, *supra;* determination of same being unnecessary to reach decision herein.

Plaintiffs argument that constitutional objections should be overcome, for the reasons as set forth in their pleadings and briefs, are rejected.

A Judgment necessary to effectuate this Opinion shall be submitted in accordance with GCR 1963, 522.1.

/s/ Joseph P. Swallow
Joseph P. Swallow, Circuit Judge

Dated: March 1, 1977.

APPENDIX D

FINAL JUDGMENT OF MICHIGAN SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN

Held at the Supreme Court Room, in the City of Lansing, in the 23rd day of December in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable MARY S. COLEMAN, Chief Justice, THOMAS GILES KAVANAGH, G. MENNEN WILLIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices

SC 61917
CoA 77-1225
LC 75-000877 CH

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, a Delaware Corporation, SKELLY OIL COMPANY, a Delaware Corporation, TOTAL LEONARD, INC., a Michigan Corporation, THE DOW CHEMICAL COMPANY, a Delaware Corporation, SAXON OIL COMPANY, a Texas Corporation,

Plaintiffs-Appellants,

v.

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware Corporation, DELORES M. COOK, d/b/a/ SOUTHWESTERN OIL COMPANY,

Defendants-Appellees.

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals is REVERSED and the cause is REMANDED to the Circuit Court for the County of Montmorency for further proceedings in conformity with the opinion filed herein. No costs are to be taxed.

APPENDIX E

NOTICE OF APPEAL

STATE OF MICHIGAN SUPREME COURT

No. 62256

H. JOHN VAN SLOOTEN, *Plaintiff-Appellee,*

v.

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAYE PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LESTER TEATER: unknown claimants, unknown owners; and any and all unknown heirs, devisees, legattees, and assignees of NELLIE F. GILL, deceased,

Defendants-Appellants.

No. 61917

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, a Delaware Corporation, SKELLY OIL COMPANY, a Delaware Corporation, TOTAL LEONARD, INC., a Michigan Corporation, THE DOW CHEMICAL COMPANY, a Delaware Corporation, SAXON OIL COMPANY, a Texas Corporation,

Plaintiffs and Appellants,

v.

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, ISABELLE CRAIG, sole heir-at-law and successor in interest to Carl M. Worth, SHELL OIL COMPANY, a Delaware Corporation, DELORES M. COOK, d/b/a SOUTHWESTERN OIL COMPANY,

Defendants and Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that ISABELLE CRAIG, as sole heir-at-law and successor in interest to CARL M. CRAIG, and SHELL OIL COMPANY, a Delaware corporation, the defendants and appellees in No. 61917 above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Michigan, reversing the entry of judgment against plaintiffs-appellants, entered in this action on December 23, 1980. This Notice supersedes the Notice of Appeal previously filed with this Court on February 24, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Date: March 12, 1981

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NO. 80-1575

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ISABELLE CRAIG, sole heir-at-law and successor in interest to CARL M. WORTH, and SHELL OIL COMPANY, a Delaware corporation,

Appellants,

v.

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, TOTAL LEONARD, INC., THE DOW CHEMICAL COMPANY, SAXON OIL COMPANY, JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, and DELORES M. COOK d/b/a SOUTHWESTERN OIL COMPANY,

Appellees.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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NO. 80-1575

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ISABELLE CRAIG, sole heir-at-law and successor in interest to CARL M. WORTH, and SHELL OIL COMPANY, a Delaware corporation,

Appellants,

v.

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, TOTAL LEONARD, INC., THE DOW CHEMICAL COMPANY, SAXON OIL COMPANY, JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, and DELORES M. COOK d/b/a SOUTHWESTERN OIL COMPANY,

Appellees.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

STATEMENT OF THE CASE

This action to quiet title was filed in a Michigan Circuit Court by John and Etta Mae Bickel and various parties claiming a leasehold estate in oil and gas through the Bickels.[1] Named as defendants were Carl and Doris Worth, both now

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[1] Getty Oil Co., Skelly Oil Co., Total Leonard, Inc., Dow Chemical Co., and Saxon Oil Co.

deceased, and others claiming conflicting rights to the same property.[2]

The facts underlying this case are not in dispute. In 1944, Isabelle Worth deeded to others the surface rights to a parcel of real estate. She, however, reserved the mineral estate pertaining to that parcel. Carl and Doris Worth succeeded to the interests of Isabelle Worth upon her death in 1956. In 1973, they purported to grant an oil and gas lease to Shell Oil Company.[3]

The surface rights sold by Isabelle Worth in 1944 ultimately were conveyed to John and Etta Mae Bickel. In 1974, the Bickels leased oil and gas interests underlying their property to Getty Oil and others.

The premise underlying the Bickels' lease to Getty and their assertion of title to the mineral rights against the Worths is the Michigan Dormant Mineral Act, Michigan Comp. Laws 554.291 ("Act"). That statute, which was passed in 1963 provides that "any interest in oil or gas in any land" shall be taken from the subsurface owner and given to the surface owner unless, within the prior 20 years, (1) it has been sold, leased, mortgaged, or transferred by recorded instrument; (2) a "drilling permit" has been issued for such oil or gas; (3) "actual production" or withdrawal of oil or gas has occurred; (4) the lands in question have been pooled, unitized, or otherwise included in a plan of unit operations; or (5) the area has been used for the underground storage of gas.

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[2]

Shell Oil Co., James and Winifred Fairchild, and Delores Cook d/b/a Southwestern Oil Co.

[3]

The Worths have since died, and their daughter and sole heir-at-law, Isabelle Craig, has succeeded to their interests.

The Act was not limited to prospective operation. Instead, it applied retroactively to properties, such as those owned by the Worths, where the mineral and surface estates were severed prior to its enactment. Owners of such mineral estates, or those claiming through them, were given three years following the enactment of the statute to register their interest in the mineral estate. Thereafter, failing such registration, the Michigan statute automatically vests title in the surface owner. Importantly, the statute in no way impedes the rights of parties who have lost their interests under the Act, from bringing a post-deprivation quiet title action to prove that they had performed one of the acts required to maintain possession of their mineral rights.

In the proceedings below, it was conceded that neither the Worths nor those claiming through them had performed any of the acts enumerated in the Act prior to the enactment of the statute, nor had they fulfilled the registration requirement in the three years that followed. Moreover, none of the parties involved in these earlier proceedings ever asserted that they lacked notice regarding the nature and requirements of the Act.

The only issue presented for decision in these earlier forums was the constitutionality of the statute under both the Michigan Constitution and the United States Constitution. Specifically, the defendants argued in their motion for summary judgment that the Michigan statute deprived them of their property without due process and equal protection of the laws under the Fourteenth Amendment and was an unconstitutional impairment of contract proscribed by Article 1, Section 10, of the United States Constitution.

The trial court granted the Worths' summary judgment motion and struck down the Dormant Mineral Act under the Michigan constitution. The Michigan Court of Appeals affirmed the trial court's judgment. The Michigan Supreme Court reversed.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

Now come the appellees, John E. Bickel, Etta Mae Bickel, Getty Oil Company, Total Leonard, Inc., The Dow Chemical Company, Saxon Oil Company, James I. Fairchild, Winifred E. Fairchild, and Delores M. Cook d/b/a Southwestern Oil Company, and move this court to dismiss or in the alternative to affirm the decision of the Michigan Supreme Court on the ground that there is no substantial federal question.

I.

Appellants initially challenge the Michigan Dormant Mineral Act, Michigan Compiled Laws § 554.291 (1970), as constituting a "Taking of Property" without compensation in violation of the Fifth Amendment as applied to the States through the Fourteenth Amendment. In asserting this view, appellants have improperly interpreted the lengthy and complex history of this Court's decisions with respect to the "Taking" clause.

The various activities engaged in by government form a vast continuum across which this Court has frequently cast inspection. At one extreme, government activities can be fairly described as pure takings. These occur when the State directly invades and appropriates the property of an individual for the public's benefit. The exercise of the eminent domain power to obtain a piece of property for the purpose of building a highway is an example of this type of pure taking. As one moves along this continuum, the rights of individuals to seek redress for government actions diminish, and eventually blend into situations which are justified under the power of the State to regulate in the interests of the public health, safety, welfare and morals. In these cases, although an individual's

property interest is impaired, courts have failed to find the degree of deprivation necessary to constitute a compensable taking. Finally, at the far end of the continuum, beyond those regulatory actions which fall short of a taking, we find government conduct which, although appearing to affect the substantive interests of individuals, has been defined as not affecting substantive rights at all, and thus beyond the scope of Fifth and Fourteenth Amendment protection. It is into this category that the Michigan Dormant Mineral Act falls.

The Michigan Dormant Mineral Act, like many other statutes which have withstood constitutional challenge, does nothing more than impose affirmative duties on individual rightholders; failure to perform such duties jeopardizes those rights. In such cases, courts have viewed this type of legislative enactment as affecting remedies and procedures, and not substantive rights.

A typical example of this occurs in the context of statutes which involve limitations on actions. This Court has held that such statutes affect remedies, not substantive rights; and, therefore, do not disrupt Fifth and Fourteenth Amendment interests. *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, *reh. denied*, 325 U.S. 896 (1945).

The willingness of legislatures to impose affirmative duties on interest holders has been especially prevalent with respect to real property. The impetus for such legislation stems from a long standing policy which favors keeping property in the free flow of commerce. This has prompted a series of enactments which have worked to free property from stale claims and disinterested ownership. For the most part, these legislative initiatives have placed affirmative responsibilities on property holders, who then must comply or run the risk of losing their interests. The courts, with near absolute regularity, have upheld such legislation.

Probably the oldest statutes of this sort are the adverse possession acts. This Court has long taken the position that such laws are constitutional, even though they work to bring about a complete loss of title to property. *See Toltec Ranch Co.* v. *Cook*, 191 U.S. 532 (1903); *Campbell* v. *Holt*, 115 U.S. 620 (1885). Furthermore, in *Soper* v. *Lawrence Brothers Co.*, 201 U.S. 359 (1905), this Court upheld a unique adverse possession law which in many ways paralleled the type of legislation involved in this matter. There, a bill which provided for the obtaining of title to wild land in Maine, property which, like mineral interests, was not readily susceptible to the usual acts of possession consistent with ownership, was ruled constitutional. In reaching that conclusion, the Court noted that the bill provided title holders with the chance to preserve their interests by engaging in certain affirmative conduct (i.e. paying taxes), rather than requiring them to engage in more overt acts of ownership. As with the Michigan Dormant Mineral Act, title holders under the Maine Wild Land Statute could maintain their rights by simply performing the acts enunciated in the legislation.

Courts have accorded similar treatment to another type of statute which places affirmative duties on property owners: recording act legislation. Thus, in *Vance* v. *Vance*, 108 U.S. 514 (1883), this Court upheld the constitutionality of land recording acts in the face of a Fourteenth Amendment challenge. Appellants contend, however, that unlike recording acts, the Michigan Dormant Mineral Act offers title holders no recourse against sellers. In making this argument, though, they fail to realize that the relief potentially available to those who lose their interests via a recording act does not include a return of title, but rather is limited to an action on the contract. Thus, as with the Dormant Mineral Act, recording acts effectuate a complete taking of title.

While adverse possession statutes and the recording acts require land owners to take certain minimal actions to maintain their property interests, this Court has been willing in certain circumstances, to impose even more substantial burdens on right-holders. In *American Land Co.* v. *Zeiss*, 219 U.S. 47 (1911), the Court upheld a California statute that required property owners in rightful possession, to affirmatively appear in court and prove their title to property in order to overcome the recordation problems created by the San Francisco earthquake of 1906. There, the Court said "So, also, it is conclusively established that when the public interests demand, the law may require even a party in actual possession of land and claiming a perfect title to appear before a properly constituted tribunal, and establish that title by judicial proceeding." *Id* at 60.

Probably the legislation most analogous to a Dormant Mineral Act is a marketable title act. As with the Dormant Mineral Act, most marketable title statutes place time limits on the period during which interest holders must act to protect their rights. And, as with the Dormant Mineral Act, marketable title statutes generally operate retrospectively, while, at the same time, offering adverse claimants a grace period during which they may assert their interests. Thus, under the marketable title acts, the rights of interest holders may be cut-off if they fail to take the legislatively-mandated action needed to protect those interests. The same circumstances exist with respect to the Dormant Mineral Act. Not surprisingly, numerous courts have upheld marketable title acts in the face of constitutional challenges. *See Wichelman* v. *Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957); *Lane et al.* v. *Travelers*, 230 Iowa 973, 299 N.W. 553 (1941).

The Michigan Dormant Mineral Act, like many statutes relating to real property, imposes affirmative duties upon interest holders. In this case, the statute requires the owners of severed mineral rights to perform one of a number of specified

acts, the least burdensome of which requires them to publicly file a notice of continued interest, or face termination of their interest. The Act does not, however, constitute any direct deprivation of property. Instead, it establishes procedures which must be followed by interest holders to maintain their property. As such, the Act is not a regulation which affects substantive rights. Consequently, like marketable title acts, recording acts, and adverse possession statutes, it does not offend the dictates of the Fifth and Fourteenth Amendments.

Even if the Michigan Dormant Mineral Act were to be characterized as a measure affecting substantive rights, it does not rise to the level of a compensable taking. As commentators have noted, *see* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165 (1967); Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964), and this Court has stated, " . . . this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, . . . whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124, *reh. denied*, 439 U.S. 883 (1978).

Although the Court has tended to operate in these matters on a case by case basis, the *Penn Central* decision defined the types of considerations which are to be examined when determining whether a governmental action rises to the level of a taking. "In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-

backed expectations are, of course, relevant considerations . . . So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124.

Clearly, the Michigan Dormant Mineral Act does not have the kind of detrimental impact on "distinct investment-backed expectations" identified by the Court in *Penn Central* as necessary to trigger the Constitution's compensation requirements. The interests of owners of subsurface mineral rights are not substantially "interfered with" by the notice requirements imposed by the statute. Nor does the statute provide for the government to "physically invade" the property of the mineral rights holder. Instead, the regulation adjusts the benefits and burdens of economic relationships to promote the common good. For these reasons the Dormant Mineral Act does not constitute a taking as that term is employed by the Fifth and Fourteenth Amendments.

Moreover, in recent decisions affecting real property, courts have tolerated a broad employment of the police power in the interest of providing for the public welfare and general economic good.

In *Goldblatt et al.* v. *Town of Hempstead*, 369 U.S. 590 (1962), this Court upheld a local ordinance which effectively extinguished the mineral interests of the owners of a sand and gravel quarry, by placing severe restraints on the levels at which excavation could be conducted on their property. There the Court said "Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an

oft-repeated truism that every regulation necessarily speaks as a prohibition." *Id.* at 592.

Similarily, in *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), this Court ruled that a zoning restriction which reduced the value of appellants' property from $800,000 to $60,000 was within the reasonable police powers of the state, and not a Fifth Amendment taking.

In a similar fashion, the California Supreme Court upheld the constitutionality of a zoning ordinance like the one in *Goldblatt*, which effectively extinguished plaintiff's mining business. There, although the trier of fact determined that the property involved had no appreciable value other than as an excavation site, the courts upheld the ordinance against a charge that it constituted a taking. *Consolidated Rock Products Co.* v. *City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

In support of their contention that the Dormant Mineral Act constitutes a "Taking," appellants have relied on this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), where the Court declared unconstitutional a statute which prevented the owners of mineral rights from mining coal if such activities threatened the buildings under which those mining operations were occurring. In reaching its decision, the Court balanced a number of factors including the interests threatened if mining were continued, and the diminution in value of the mineral interests caused by the regulation. The Court eventually decided that the balance of equities was so heavily tilted in favor of the mine owners, that the government interference had to be characterized as a taking.

In this case, however, the interests of the mineral owners are clearly subordinate to the public interests which will be served by the legislation. Here, unlike the appellants in

Mahon, interest holders must have been sleeping on their rights for at least 20 years in order to be affected by the statute. Rather than engaging in the productive use of their property like the appellants in *Mahon*, owners of subsurface interests affected by the Michigan Dormant Mineral Act have kept their properties out of the free flow of commerce for two decades in the face of one of this nation's most serious domestic crises. For them, the balancing considerations detailed in *Mahon* must clearly be said to fall the other way.

An application of this balancing concept is seen in this Court's ruling in *Miller* v. *Schoene*, 276 U.S. 272 (1928). There, the Court upheld a Virginia statute which provided for the destruction of appellant's red cedar trees because of the adverse effects on other forestry in the state caused by the rust produced by the cedars. In considering the relative importance of the various forest products involved, the Court determined that the legislation did not rise to the level of a taking. A similar weighing of interests leads one inevitably to the conclusion that the Michigan Dormant Mineral Act is likewise not a taking.

II.

There is also not a substantial federal question presented by appellants' challenge of this statute as a violation of constitutionally-mandated procedural due process. In fact, appellants' claim that their rights to procedural fairness have been violated, must be deemed insubstantial based on the record itself. Appellants have made no assertion that they lacked notice of the recording requirements of the Dormant Mineral Act, or of the Act's other provisions spelling out actions which, if taken, would prevent them from being deprived of their interests. Moreover, in their stipulations to the trier of fact, to the Michigan courts and to this Court, appellants have acknowledged that they have undertaken none of the various acts

which would preserve their title under the statute. Because of this, it is clear that appellants could not prevail in this quiet title proceeding absent a ruling that the Act is unconstitutional on other grounds, since they would not be successful in this action even if the Act provided for such procedural steps as notice and a pre-deprivation hearing. In short, appellants have not suffered injury as a consequence of the procedures dictated by the Act, and thus have not had their constitutional rights to procedural due process chilled. While other severed mineral interest holders might be able to assert ignorance of the Act, or challenge the facts regarding their conduct with respect to their mineral interests, and as a consequence claim injury as a result of the Act's procedures, this Court has stated, "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953).

This Court has, of course, created a narrow set of circumstances under which surrogates may assert the rights of others, but it would not appear that appellants fall within this definition. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *N.A.A.C.P.* v. *Ala. ex rel. Patterson*, 357 U.S. 449 (1958), this Court identified a series of conditions, the presence of which might permit parties to assert rights as surrogates for absent right holders. Specifically, the Court has identified three such conditions: a substantial relationship between the surrogate and the right holder; the existence of barriers which might prevent the actual right holder from asserting his or her rights; and the possibility for dilution of those rights in the event that they were not resolved in the particular proceeding.

It would not appear that any of these factors exist in the present circumstances, and hence appellants lack standing to raise this procedural due process challenge. There is no substantial relationship between this mineral right holder and other mineral owners who either lacked notice of the legisla-

tion or its impending impact on them, or who might be able to claim that a factual issue exists regarding whether or not they had performed any of the statutorily defined acts which would prevent loss of title. Each is a separate property owner, and no relationship, formal or informal, exists between the appellants and those potential parties. Nor do those with legitimate claims of procedural unfairness have any barriers preventing them from asserting their constitutional challenges. Finally, there is little likelihood that the failure to resolve the procedural due process issue at this time will dilute, or impair the interests of absent right-holders. The Dormant Mineral Act has now been in effect for 18 years. Thus, few additional mineral interest holders are likely to suffer from lack of notice of the Act's salient features. Moreover, since the Act does not preclude disseised parties from challenging that result in a quiet title proceeding, failure to resolve this question will not impair the rights of parties to seek redress for a wrongful deprivation.

Appellants do not claim they suffered any injuries as a consequence of the procedures imposed by the Act, nor do they meet the various criteria established to permit them to advocate the rights of others. And since, in the words of *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976), one of the major reasons for denying parties the right to raise the constitutional claims of others is the fact that ". . . third parties themselves usually will be the best proponents of their own rights [and since] courts depend on effective advocacy, [they] should prefer to construe legal rights only when the most effective advocates of those rights are before them," appellants lack standing to press this claim.

Even if appellants have standing to assert their procedural due process challenge, such a contention is inappropriately raised in the context of the Michigan Dormant Mineral Act.

This legislative enactment does not constitute a deprivation of property such that an individual's right to process under the Fifth and Fourteenth Amendment is triggered. Rather, the Act merely serves to place responsibilities on the owners of mineral rights, which must be performed in order to preserve their interests. The Act neither takes property, nor directly deprives property owners of their interests.

Legislatures regularly establish procedures which interest holders must follow to protect their rights. The legislative process itself is said, in these circumstances, to constitute due process for those individuals affected by statutes directed at a broad class of citizens. J. Nowak, R. Rotunda & J. Young, *Handbook on Constitutional Law* 500 (1978).

When the legislature enacts a bill which regulates property interests in this fashion, the legislation itself provides sufficient notice of its recording requirements, as the Michigan Supreme Court ruled in *Van Slooten* v. *Larsen, et al.*, 410 Mich. 21, 52 n.28, 299 N.W.2d. 704, 714 n.28 (1980). Clearly, it would invoke a major hardship on government, and significantly impair the State's ability to enact important regulatory legislation, were the legislature required to build a notice mechanism, designed to make all potentially interested parties aware of the enactment, into every statute. Courts have long held that a man is not innocent whose defense is based on ignorance of the law, and this Court has stated that "All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes." *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 243 (1944). For these reasons, courts have regularly upheld legislative enactments affecting property such as adverse possession laws and the recording acts, without calling for added due process safeguards, even though such bills set in motion a process that can ultimately lead to

disseisin without providing for notice and the opportunity to be heard.

Assuming, arguendo, that the Michigan Dormant Mineral Act were characterized as a substantive deprivation, such that procedural fairness and due process were demanded, the procedures presently available to interest holders satisfy the dictates of the Fifth and Fourteenth Amendments, and thus there is no constitutional requirement for a pre-deprivation hearing. In *Codd* v. *Velger*, 429 U.S. 624 (1977), this Court ruled that where no factual disputes exist, there is no right to any preliminary hearing, even where a substantial deprivation will ensue. As in that case, there are no factual contentions at issue in this proceeding. The parties have each stipulated to a set of facts which would cause appellants to lose title to their mineral rights if this statute is constitutional. Thus, appellants have no right to a pre-deprivation hearing.

But even if there were factual issues in dispute, there is no precise formula with respect to the exact process due in every situation. In *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), this Court held that the constitution only requires " 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane* v. *Central Hanover [Bank & Trust Co.*, 339 U.S. 306, 313 (1950)]." *Id.* at 378. That decision went on to say that there is no guarantee that every party get a hearing in every case, and that "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceeding." *Id.* at 378.

This Court's ruling in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), outlined a series of guidelines which the Court has employed to make these determinations concerning procedures

appropriate to a particular deprivation. Integral to this calculation, however, is the notion that the Court will balance the various considerations to determine the proper result. Based on the results of previous balancing efforts, it does not seem that a pre-deprivation hearing right would be found under these circumstances.

The Court in *Mathews* identified four elements which must be examined in determining what process is due: the private interest that will be affected by the deprivation; the risk of an erroneous deprivation; the value of added safeguards; and the government's interest, taking into consideration the government functions involved and the fiscal and administrative burdens entailed by alternative procedures. *Mathews* v. *Eldridge, supra,* 424 U.S. at 335.

Yet another consideration can be derived from the Court's ruling in *Ingraham* v. *Wright,* 430 U.S. 651 (1977). There, the Court suggested that the availability of later redress, either in the form of a post-deprivation hearing or a cause of action against a wrongful party, was to be considered in determining if the right to a pre-deprivation hearing exists.

Taking these factors into consideration, the Michigan Supreme Court in its decision in *Van Slooten* v. *Larsen,* et al., *supra,* 410 Mich. 21, 299 N.W.2d 704 (1980), determined that the procedures established in the Dormant Mineral Act would adequately protect the interests of parties, and stated that "... considering the interests encompassed by this Act, the risks of wrongful deprivation are minimal. The Act does not deprive owners of productive interests of their property without a hearing but only applies to severed interests which have not been worked, as defined in the Act, or recorded for over 20 years. Therefore, since the owner has not been in actual possession of the interest for over 20 years, the risks of financial or other harm from the interim deprivation are minimal . . .

Balancing the minimal protection afforded by requiring a pre-deprivation hearing against countervailing considerations, the legislative determination not to require a pre-deprivation hearing did not deprive defendants of property without due process of law." *Id.* at 54-55, 299 N.W.2d at 715.

An examination of the statute and the circumstances under which it came into effect supports the position adopted by the Michigan Supreme Court. Persons losing title under the provisions of the Michigan Dormant Mineral Act are not foreclosed from having a hearing to determine whether they have been wrongly deprived. Rather, former title holders can always launch a quiet title proceeding against the surface landowner, the individual to whom title is shifted under the Act. Because of this, the risks of an erroneous deprivation are minimized. Moreover, because this Act only affects mineral interests which have not been productively worked for at least 20 years, persons losing title are not apt to suffer serious hardship if they are forced to wait until a post-deprivation hearing to prove that they had complied with the provisions of the Act. Furthermore, at that proceeding, such deprived owners will have the chance to make claims to any pecuniary benefits which have mistakenly accured to the surface owner. For these reasons, the Act's procedures are unlikely to cause any serious injury to wrongfully deprived parties. Consequently, these procedures are likely to emerge unaltered from the type of balancing test outlined in *Mathews*.

The procedures established under the Dormant Mineral Act should also survive a balancing test intact because, from a governmental point of view, they are the only procedures practicable under the circumstances. Dormant Mineral legislation was devised in no small measure because of the strong need to clear titles to subsurface interests which have, by virtue of the failure on the part of right-holders to act with respect to their interests, created confusion with respect to

mineral ownership. Because of this, the questions may fairly be put: (1) Who would initiate a pre-deprivation hearing? and (2) How would such a hearing be undertaken? Ownership of many of these interests is in serious doubt. Time and changing conditions have hopelessly cluttered titles to certain mineral rights, and consequently it is impracticable to expect the government to initiate a formal proceeding every time a 20 year ownership period expires. Moreover, given the lack of clarity as to mineral ownership, placing this burden on the government is both very expensive, and unlikely to provide a substantial safeguard against wrongful and erronerous deprivation. For all these reasons, a balancing of interests argues against a pre-deprivation hearing in these cases.

This position is consistent with the trend of recent decisions regarding pre-deprivation hearing rights. In *Mathews, supra,* the Court held that a pre-deprivation hearing was not required prior to the decision to cut off social security benefits. In *Ingraham, supra,* the Court held similarly that a pre-deprivation hearing was unnecessary in the case of the administration of corporal punishment in the public schools. And, more recently, in *Dixon* v. *Lane,* 431 U.S. 105 (1977), this same verdict was reached in the context of the suspension of a driver's license. *See also Barry* v. *Barchi,* 443 U.S. 55 (1979).

Appellants' reliance on the decision of this Court in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), and various cases involving state escheat statutes, *see Standard Oil Co.* v. *New Jersey,* 341 U.S. 428 (1951); *Anderson National Bank* v. *Luckett,* 321 U.S. 233 (1944); and *Security Savings Bank* v. *State of California,* 263 U.S. 282 (1923), as the basis for asserting a right to greater procedural safeguards under the Dormant Mineral Act is mistaken.

Each of these cases involved the Court's determination of the appropriate notice in ". . . any proceeding which is to be

accorded finality . . ." *Mullane* v. *Central Hanover Bank & Trust Co., supra,* 339 U.S. at 314. The passage of title to mineral interests under the Michigan Dormant Mineral Act is not a "proceeding which is to be accorded finality." Deprived mineral owners still have available to them a quiet title action to regain their wrongfully taken interests. Moreover, surface owners seeking to gain judicial ratification of the legitimacy of their title to the mineral interests gained as a consequence of the Dormant Mineral Act, are required to give proper notice to deprived former right holders.

Furthermore, appellants' reliance on these cases to form the basis for its due process claim is also incorrect because, in effect, it turns due process doctrine on its head. What appellants have done is to take the requirement that notice be given identifiable parties in the context of a "proceeding to be accorded finality," devised in *Mullane,* and used it to find a general right of notice for any traceable party affected by any piece of legislation. Then, having allegedly found a notice right, they have attempted to also employ a bootstrap argument to find a hearing right. This is an incorrect analysis of the constitutional law as it pertains to procedural due process. As the Michigan Supreme Court stated, "because the due process guarantees do not require a hearing prior to vesting title in the owner of the surface estate, we do not accept defendant's claim that the absence of any provision in the statute for notice of such a hearing renders it constitutionally infirm. The constitutional right to notice of a hearing is implicit in and dependent upon a right to an opportunity for a hearing. No such hearing is provided for or required by the statute; therefore it is not unconstitutional on the basis that it does not have adequate provisions for notice of such a hearing." *Van Slooten* v. *Larsen, et al., supra,* 410 Mich. at 55, 299 N.W.2d at 716.

III.

The Michigan Dormant Mineral Act, like its counterparts in other jurisdictions, serves many valuable public policy objectives. The numerous legislative enactments affecting property, found in the adverse possession laws, the recording statutes and marketable title acts, have all been developed for the purpose of making land marketable and keeping property within the flow of commerce. The economic goals of our society are largely dependent on the free movement of resources and the flow of productive resources into the hands of those who will maximize their usefulness. Title owners who sleep on their rights and prevent assets from being used in their most productive manner are a prime barrier to economic growth. The various legislatively created land and title clearing acts were designed to cut off these slumbering title holders and return productive assets to the channels of commerce.

Nowhere is the need greater for this type of legislation than in the area of mineral rights. This Court need not be lectured on the energy problems faced by the United States: legislation which serves to increase the production of energy is vital to our national well-being. Thus, the objectives of the Dormant Mineral Act constitute a crucial and legitimate use of the police power.

Absent legislation such as this, energy producers, fearful that their high risk investments will be undermined by the later intervention of adverse interest holders, are not likely to make the major kinds of financial investments required to explore for subsurface minerals. The costs of drilling a dry well are enormous and the risks substantial enough, without the added threat of encountering conflicting title problems. At a certain stage, the risks exceed the potential benefits of exploration, and when they do, investors lack the incentive

needed to take the actions required to develop new energy sources. The Michigan Dormant Mineral Act serves the valuable public policy purpose of lowering these steep odds to an acceptable level.

CONCLUSION

The Michigan Dormant Mineral Act is merely an extension to the area of severed oil and gas interests of the same legal principles which have sustained the constitutionality of the recording acts, adverse possession statutes and marketable title acts. Moreover, it is consistent with a line of cases, decided by this Court, wherein government actions have been held not to constitute a constitutional "Taking."

Because the Act does not directly deprive individuals of their property, it likewise does not deprive them of their right to procedural due process. But even if it had such an impact, the procedural safeguards provided by the Act, are adequate to protect the constitutional rights of individuals affected by the legislation.

For these reasons, and because the Act in question here serves a valid and valuable public purpose the appeal should be dismissed or, in the alternative, the decision of the Michigan Supreme Court in *Van Slooten* v. *Larsen, et al.* should be affirmed.

Respectfully submitted

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No. 80-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ISABELLE CRAIG, sole heir-at-law and successor in interest to CARL M. WORTH, and SHELL OIL COMPANY, a Delaware corporation, *Appellants,*

v.

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, TOTAL LEONARD, INC., THE DOW CHEMICAL COMPANY, SAXON OIL COMPANY, JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, and DELORES M. COOK d/b/a SOUTHWESTERN OIL COMPANY, *Appellees.*

On Appeal From The Supreme Court Of Michigan

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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* A listing of the affiliates and subsidiaries of Shell Oil Company required by Rule 28.1 of the Rules of this Court appears in appellants' Jurisdictional Statement, p.i., n. **.

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On Appeal From The Supreme Court Of Michigan

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

I.

Earlier this Term, the Court noted probable jurisdiction in two appeals that raise, inter alia, the same issue as this appeal and that concern a nearly identical state dormant mineral act. *See Texaco, Inc.* v. *Short,* No. 80-965, and *Pond* v. *Walden,* No. 80-1018, *prob. juris. noted and consolidated,* 49 U.S.L.W. 3710 (March 23, 1981).

Appellees do not contend that the Indiana appeals are distinguishable in any way from this case. The statutes before the Court in the Indiana appeals and the one in this case provide for automatic extermination of fee ownership of subsurface mineral interests. Neither statute provides notice to the affected owner, or an opportunity to be heard, or compensation for the lost interests. Both statutes are the subjects of substantial challenges under the Due Process Clause of the Fourteenth Amendment. The decision to undertake plenary review of the Indiana judgment should lead to the same treatment of the Michigan judgment.

II.

A.

Appellees misconceive appellants' argument that the Dormant Mineral Act ("the Act"), Mich. Comp. Laws § 554.291 (1970), effects a taking of property without affording the safeguards required by the Fifth and Fourteenth Amendments.

The principal reason advanced by appellees in support of their argument that the Act does not effect a taking is their assertion that it does not impair substantive property rights, but is procedural, like a statute of limitations. The Michigan Supreme Court's binding construction of the Act negates this assertion: "[T]he act is designed to increase the marketability and development of severed mineral interests by creating a rule of substantive law which requires owners to undertake minimal acts indicative of ownership at least every 20 years." (Juris. Statement at 17a.)

Appellees also argue that affirmative duties may be imposed upon landowners without due process notice. Their reliance in this regard upon *American Land Co.* v. *Zeiss*, 219 U.S. 47 (1911), supports our position, not theirs. While it is true that landowners there were required by the California legislature to assert their claims to land and affirmatively prove their title after the San Francisco earthquake of 1906, the statute was not self-effectuating. Title to land was settled or lost orly by judicial decree in an *in rem* proceeding. And, most important here, notice by publication had been given in designated newspapers at least once a week for two months to the landowners prior to those proceedings. *Id.* at 49-54, n.1.

The law of adverse possession is similarly not helpful to appellees' position here. As recognized below, adverse possession in Michigan requires actual possession (Juris. Statement at 11a) which is notorious, open, and hostile. Such possession of land by another is deemed to constitute notice of an adverse claim to the land. *See, e.g., Welch* v. *Unknown Heirs*, 226 F.2d 776, 779 (D.C. Cir. 1955).[1]

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[1] As we have shown, the Act is also unlike marketable title acts or other title recordation legislation (Juris. Statement at 12.) Those statutes, unlike the Michigan Dormant Mineral Act, involve situations where more than one party has some legitimate claim, albeit perhaps conditional and remote, to the same property. Marketable title acts provide a means for assigning priority among such claims. Here, by contrast, the Michigan statute takes property from one person with clear title and gives it to another whose sole claim of title is based upon the statute itself. Moreover:

> "[A]s a practical matter, [marketable title acts] will probably cut off nothing at all, because there are no valid outstanding claims. It has been the experience of states with long-term marketable title acts that few if any notices of claim are ever filed, thus indicating that few claims actually exist." L. Simes, The Improvement of Conveyancing by Legislation 4 (1960).

Appellees also rely upon the tests identified by the Court in *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104 (1978), to demonstrate that there is no taking of property under the Act. But the "economic impact" focused upon in *Penn Central, id.* at 124, "and, particularly the extent to which the regulation has interfered with distinct investment-backed expectations," *id.,* could hardly be more complete than in this case—a destruction of all title to property whose principal function is to provide income to its holder.

Moreover, *Penn Central 's* purported requirement of a "physical invasion" of property by government (Motion to Dismiss at 9) does nothing to advance appellees' case here. The Michigan statute deprives a mineral estate owner of his possessory interest and vests it in another. It is hard to imagine an invasion of a property right that is more severe. In any event, to the extent appellees claim that actual physical trespass is required to give rise to a taking, they ignore decisions of this Court that make it clear that, even in the absence of a physical invasion, the total deprivation of all ownership rights—for instance, title to intangibles—may constitute a taking. *See, e.g., Armstrong* v. *United States,* 364 U.S. 40 (1960).

B.

A fundamental error pervades appellees' discussion of the taking issue raised by this appeal. They focus only upon the registration requirement of the Act and fail to recognize or deal with the destruction of title to real property that the Act brings about as a result of the failure to register. (Motion to Dismiss at 9.)

The same error leads to appellees' reliance upon the *Goldblatt-Hadacheck-Schoene* line of cases[2] (Motion to Dismiss at 9-11). Appellees emphasize the significant reduction in value to the property in all three cases, pointedly referring to the Court's refusal to find that there had been a taking. All of these cases, however, were land use regulation cases, where the landowners argued that the challenged regulation was so severe that it rose to the level of a taking. This appeal, by contrast, is not a case of taking by regulation. Rather, the State of Michigan has adopted regulations that are enforced by a taking. When, as here, the statutory scheme results in a taking, nothing less than notice and an opportunity to be heard can satisfy the requirements of the Constitution.

C.

Appellees devote the last two pages of their Motion to Dismiss to an explanation of the public policies which they say are promoted by the Act. Appellants do not contend that the Act fails to serve a valid public purpose. It is important, however, to recall what that purpose is. In the words of the Michigan Supreme Court:

> "The primary purpose of the act is not to vest title to the severed [oil and gas] interests in the surface owner but rather is to facilitate development of those sub-surface properties by reducing the problems presented by fragmented and unknown ownership." (Juris. Statement at 10a.)

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[2] Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Miller v. Schoene, 276 U.S. 272 (1928).

While the Michigan statute's purpose is not being challenged, the legislature's choice of means to accomplish that purpose is. The issue here is whether the State can achieve its goal by taking private property by means of a self-effectuating statute that fails to provide affected owners with any notice of the taking or any opportunity to be heard in order to assert their ownership at a time when such an assertion may still have meaning.

The problem addressed by the Act is very similar to that which the States' escheat statutes address: how to return lost, abandoned, or forgotten property into the stream of commerce. Appellees, however, ignore the Constitutional underpinnings of the escheat statutes, and consequently depreciate the significance of this Court's decisions reviewing these acts.

Appellees' argument against the applicability of the escheat statutes to this case actually identifies the chief source of the Act's unconstitutionality. They recognize that escheat statutes do provide a proceeding to which finality attaches and require notice of that proceeding. Here, although the Act purports to operate with finality (title "shall vest . . . in the owner or owners of the surface"), it fails to provide for any proceeding where the property owner has a meaningful opportunity to object to the taking of his property or any notice of the operation of the Act upon individual interests. Michigan's avoidance of the fair notice requirements that lie at the heart of the Due Process Clause, *e.g., Armstrong* v. *Manzo,* 380 U.S. 545, 550 (1965), can hardly be justified by an argument that emphasizes Michigan's failure to provide any proceeding to which such notice might attach.

Similarly, appellants' reliance on the escheat cases cannot be avoided by the argument (Motion to Dismiss at 4-5, 14-15) that a State may impose restrictions upon the ownership, use, and disposition of property,[3] or that a person is presumed to have notice of all such laws. This Court has so stated in its review of Kentucky's escheat statute. *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 243 (1944). But more than mere constructive notice of the statutory definition of abandoned bank accounts and other intangibles is required before the property rights of depositors can be cut off:

> "[I]f the statute is deficient in its provisions for notice and opportunity for hearing so that the depositors would not be bound by any proceedings taken under it, the bank would be entitled to raise the question whether its obligation to the depositors would be discharged by payment of the deposits to the state. *Hence our inquiry must be directed to the question whether the procedure by which the state undertakes the depositors' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard.*" *Anderson National Bank* v. *Luckett, supra*, 321 U.S. at 243 (emphasis added).

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[3] This Court is not being asked to consider the quite different issues presented by a statute that applies only prospectively and that merely conditions the type of mineral interests which may thereafter be created. Legislation that is prospective only was thought by the author of the Act to be a "basic requirement[] for such a statute to make it constitutional," Street, *Need for Legislation to Eliminate Dormant Royalty Interests*, 42 Mich. State B.J. 49, 52 (1963), but the Act has been given retroactive effect as well.

The purpose of such notice is to inform a depositor of the State's plan to claim the account and to give him or her the opportunity to appear before an administrative or judicial officer and assert ownership of the funds—in effect, to state that the account has not been abandoned.

Appellants claim a similar right to be informed here *before* their property is taken. As the Court held in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the notice required by the Due Process Clause is a meaningful notice given at a time when the recipient of the notice can still take action to preserve its property.

Thus, appellees miss the point when they state that sufficient post-deprivation opportunities exist for affected owners of oil and gas interests to assert that they have performed one or more of the activities listed in the Act (Motion to Dismiss at 15-17). The hearing referred to by appellees is meaningless when considered from the perspective of the property owner's need to be informed that his or her property is in jeopardy at a time when action can be taken to save it. Only notice prior to the taking will afford a meaningful opportunity to claim the property before the statute operates to take it.[4]

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[4] Appellees' related assertion that appellants lack standing (Motion to Dismiss at 11-13) is wrong for the same reason. Appellants are not arguing for a hearing on issues that concededly do not apply to them. We are claiming a Constitutional right to be heard on an issue that is totally ignored in the Dormant Mineral Act.

Appellees concede that if the Act results in "a substantive deprivation" of property rights, notice and an opportunity to be heard would be required by the Due Process Clause (Motion to Dismiss at 15-19). However, appellees would limit such "due process" to a post-taking hearing at which it would be too late for the property owners to assert his or her interest in the property. Appellants, on the other hand, seek a meaningful hearing, before the taking is accomplished, that gives owners of sub-surface minerals timely opportunity to challenge the taking.

In this regard, appellants seek to protect a basic interest that was recognized in the Court's decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). That case recognized an individual's right to notice of a proceeding to settle accounts, not for the purpose of litigating factual issues, but simply to state that he or she did not want to be represented by the trustee in that proceeding.[5] Similarly, in this case, appellants claim the right to be notified and appear to assert their rights prior to the time when the statute condemns them.

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[5] *See also* Fed. R. Civ. P. 23(c)(2), which recognizes the constitutional right of a party to be notified that its interests may be decided in a proceeding and to appear solely for the purpose of "opting out." *See* Hansberry v. Lee, 311 U.S. 32 (1940).

CONCLUSION

For the reasons recited above, this Court should deny appellees' Motion to Dismiss or in the Alternative to Affirm, grant the pending appeal, and hear this case on the merits.

Respectfully submitted,

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